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UNITED STATES COPYRIGHT ROYALTY JUDGES

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IN THE MATTER OF:	)	
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DETERMINATION OF RATES	)	Docket No.
AND TERMS FOR MAKING AND	)	16-CRB-0003-PR
DISTRIBUTING PHONORECORDS	)	(2018-2022)
(PHONORECORDS III),	)	

OPEN SESSIONS

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(PHONORECORDS III),)

----------X

BEFORE: THE HONORABLE SUZANNE BARNETT

THE HONORABLE JESSE M. FEDER

THE HONORABLE DAVID R. STRICKLER

Copyright Royalty Judges

Library of Congress

Madison Building

101 Independence Avenue, S.E.

Washington, D.C.

March 8, 2017

9:05 a.m.

VOLUME I

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P R O C E E D I N G

(9:05 a.m.)

JUDGE BARNETT: Good morning, everyone. Please be seated.

I considered acknowledging a Day Without a Woman today, but since the law requires us to serve as a panel of three, I thought better of it.

Good morning, all. Today marks the -- is this on now? Yes. This is going to be tricky.

Today marks the commencement of the Copyright Royalty Judges' hearing to determine royalty rates and terms for the making and distribution of phonorecords during the period of January 1st, 2018 to December 31st, 2022.

The Docket Number is 16-CRB-0003-PR. On February 16th, the judges bifurcated the hearing to hold in abeyance those parties interested only in the configurations of phonorecords described in Subpart A of the applicable regulations found in Title 37 of the CFR, Part 385.

Licensors and licensees governed by Subpart A had proposed a settlement, including negotiated rates and terms. The judges published that proposed settlement for comment, and the final rule is currently in the library's statutory review

process.

I am Judge Suzanne Barnett. Seated to my right is Judge Jesse Feder. On my left is Judge David Strickler. Our attorney advisor, Ms. Kim Whittle, has been drafted for the duration of this hearing to serve as our hearing room clerk.

She will manage all exhibits and keep the official record of admitted and refused exhibits. At the end of the hearing, she will also work with your staff to return or destroy exhibits that you did not offer into evidence. Please feel free to check with her each day to make sure we're all current on where we stand with the record.

Seated at the back of the room is our senior counsel, Mr. Richard Strasser. He might not attend all of the days of the hearing at his discretion. Good to see you, Rich.

You have met the court reporter, Ms. Karen Brynteson, and I think you have -- some of your firms have made arrangements with her for expedited transcripts. She will be doing this hearing alone. That is pretty amazing when you are receiving dailies not to have to call in a sub halfway through the day, but she is Superwoman.

Please respect the skill and patience of

the reporters by speaking one at a time clearly and at conversational speed. We will have a recess each morning and each afternoon, and I have spoken with the court reporter already, asking her to signal at any time that she needs to stop for any reason.

We have eight participants in this portion of the proceeding with two copyright owners represented jointly by counsel. We anticipate some ebb and flow of counsel, witnesses, and guests during the course of the hearing. We ask that anyone entering or leaving the hearing room do so without disturbing ongoing proceedings.

We have rearranged the tables slightly to accommodate this hearing. And as a result, some of the power and data monuments on the floor are not hidden by a table or not under a table. So please be alert.

You have voluminous materials, so please exercise care and courtesy when getting access to the materials or moving about the hearing room. And, again, be alert to those monuments on the floor because they may present a tripping hazard.

As an aside, it is public knowledge, indeed statutorily mandated, that the judges may employ three full-time staff members total. In the

interest of full disclosure, I want to state that many of the participants in this proceeding who work with larger teams have pitched in generously.

We have welcomed thankfully the assistance with logistics, technology, document preparation and moral support. The judges do not know and, thus, cannot be influenced by which participants in particular provided the necessary assistance, but we do appreciate it greatly.

Two additional items of disclosure in an abundance of caution, first, our attorney advisor/hearing room clerk informed me that she has a self-managed investment fund in which she holds some shares of stock in at least two of the participants in this hearing.

If any participant has a concern about her interests, please advise us right away so that we can determine how to proceed. I don't think she has majority holdings in any of them. I could be wrong, but I don't think so.

Second, in my former life as a state court general jurisdiction judge in Seattle, I had one occasion to meet Mr. Bezos in my professional capacity. We have not crossed paths since, and we have no ongoing personal or professional

relationship.

So if this causes any concern, please let me know right away.

One scheduling note. We scheduled this hearing to end on April 11th. April 10 and 11 are the first two nights of Passover. In respect of the observance of Passover, we will suspend this hearing on April 10th and 11th, and we will complete it, if necessary, on April 12th and 13th.

If all the evidence is in by Thursday, April 6th, we will have only closing arguments on the 12th. If we have difficulty arranging the presence of a witness because they can only be heard on the 10th or 11th, we can discuss perpetuation or some other accommodation for those witnesses, but my experience and my sense are that we will be done before we get to that weekend.

Motions continue to flow into our office as late as last Saturday, and we as a panel have had only limited discussion on the contents of the papers filed since last Friday. With regards to the Services' omnibus motion to strike improper written testimony of Copyright Owners' fact witnesses, the judges have the motion under advisement. In the meantime, it is incumbent upon counsel to make

objections on the record to oral testimony they deem objectionable.

Objecting parties should bear in mind the following principles on timely objection: First, the judges will disregard any testimony they deem expert opinion offered by lay witnesses or expert opinion offered by an expert they deem to be beyond the bounds of the witness' expertise.

The judges will allow an expert to base an opinion on facts or data in the case that the expert has been made aware of or personally observed and if experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject.

The source data need not be admitted or admissible for the opinion to be admitted. You probably recognize -- you probably recognize that language as evidence rule 702, 703, somewhere in the 700s.

Second, the judges will disregard any fact evidence offered by a lay witness they deem to be beyond the scope of his or her personal knowledge as established by preliminary questions. That's what that foundation objection is all about.

Third, the judges will disallow and

disregard testimony they deem to be irrelevant. And I think that you all are certainly experienced and sophisticated enough to know that you don't need to bother offering irrelevant evidence.

Fourth, with regard to hearsay evidence, the Copyright Act provides that the judges may admit hearsay evidence to the extent they deem appropriate. The citation on that is 17 U.S.C. Section 803(b)(6)(C)(iii), little I.

Consequently, if a party objects to evidence on the basis of hearsay, the party offering the evidence must demonstrate why the judges should deem the evidence admissible, either by citing a hearsay objection under the Federal Rules of Evidence -- of hearsay exception, under the Federal Rules of Evidence, or for some other reason.

With regard to the Copyright Owners' motion to exclude testimony of Amazon's expert, Mr. Klein, received by e-mail on Saturday, the judges have that motion under advisement and will rule from the bench before time to present the Services' rebuttal evidence.

With regard to the Copyright Owners' motion to exclude studies or analyses under Rule 351.10(e), received by e-mail on Saturday the 4th,

the judges have that motion under advisement and will rule from the bench at the earliest time possible but before any of the named experts is called to testify.

This proceeding shall follow a pattern proposed by one side and adopted by the judges. That is the A-B-A pattern. The Services chose the A position. This hearing shall proceed using that structure.

All parties have an opportunity to make an opening statement describing what they expect their evidence to show. Opening statements are meant as a guide to assist the judges. The statements and comments of counsel in opening statements are not evidence. No other party need object. We don't take opening statements as evidence and won't consider it as such.

The evidence will be the evidence. The judges will focus on the evidence and will not impose demerits on any counsel or party for evidence that is inconsistent in any particular with the opening statements. Licensees, the Services, will then present the direct case detailing their proposed rates and the support therefor.

I should say rates and terms.

After the licensees complete their presentation of the direct case, the licensors, the Copyright Owners, will present their direct and rebuttal cases. Following the licensor Copyright Owners' presentations, the licensees will have an opportunity to present their rebuttal evidence.

Counsel will examine their witnesses, and all other parties may cross-examine each witness. In submitting their order of presentation and witness time estimates, the parties notified the judges of a conflict regarding the agreed order of presentation.

The order of presentation is A-B-A. If the Services have witnesses that will present both direct and rebuttal testimony, referred to as dual witnesses, those witnesses must return for the second A session.

A dual witness' second appearance may be by video conference, provided the party offering the witness makes all the technological and logistic arrangements for that appearance. Or, again, the parties in your spare time could perpetuate that testimony, that rebuttal testimony.

At the end of the presentation of all the evidence, direct and rebuttal, the parties will have

an opportunity to make closing arguments in which they state the applicable law and the way they wish the judges to apply that law to the evidence.

A word about evidence required in proceedings to set royalty rates and terms. Please be reminded that the judges have an obligation to set both rates and terms.

In any proceeding, just because a regulation is in the current Code of Federal Regulations does not mean that the judges are adopting that term for the coming rate period. The judges cannot determine rates or terms without an evidentiary record.

As you are all aware, rates and terms for the Section 115 phonorecords licenses were the product of settlements in the two prior phonorecords proceedings. Those rates and terms expire at the end of this calendar year.

The judges cannot adopt any terms of royalty administration, unless the parties present evidence to support their proposed terms. All parties are advised to monitor their progress to be sure they are not focusing solely on the royalty rates at the expense of the necessary administrative terms.

If you are in this hearing room today you are undoubtedly aware that the issues the judges must consider require review of sophisticated economic analyses, confidential business strategies, and sensitive financial information.

Early in this proceeding, the judges issued a protective order requiring every participant to follow a protocol to maintain and protect the confidential nature of information the parties rely upon to advocate for a desired royalty rate.

And we offer our apologies for violating that protective order as recently as last week. We hope we have made appropriate amends for that.

The fact that this is an open hearing does not override the parties' needs to protect their confidential business information. Throughout all the early phases of this proceeding, all parties have diligently marked and edited confidential documents and have filed copies of all documents redacted for public viewing, along with restricted documents for the judges' review.

Whenever a party needs to question a witness regarding restricted documents or confidential information, the judges will direct

that any person in the hearing room who has not signed an appropriate nondisclosure certificate to leave the room and wait outside until we reopen the room.

Counsel, we understand that some of you have realtime reporting being streamed; maybe all of you have realtime reporting being streamed to your desks. Please bear in mind the restrictions and the confidential information and the protective order as that information is being streamed and make sure that it is not left on view for parties who are not permitted to see restricted information. We appreciate your cooperation in this.

Now, at this time I'm going to ask each counsel, lead counsel, to stand, identify yourself for the record, and introduce your client representatives, your co-counsel, and your staff. Thank you. Let's begin over here.

MR. ELKIN: Thank you. Good morning, panel. My name is Michael Elkin from the law firm of Winston & Strawn. I have with me as my colleagues appearing before you Thomas Lane, Dan Guisbond, and Stacey Foltz Stark. We represent Amazon Digital Services. The client representatives who will be in and out of these proceedings with the

panel's permission are Jeffrey Goldberg and Steven Ward from Amazon.

JUDGE BARNETT: Thank you.

MS. CENDALI: Good morning, I'm Dale Cendali of Kirkland & Ellis. With me today are my colleagues Claudia Ray of Kirkland and Mary Mazzello of Kirkland. Also with us in the back is our key staff paralegal Erika Dillon. And with us on behalf of Apple in-house counsel, Mr. David Weiskopf.

JUDGE BARNETT: Thank you.

MR. STEINTHAL: Good morning. My name is Ken Steinthal from King & Spalding. I'm here with my team, all of whom will be participating at one point or another, Joe Wetzel, Blake Cunningham, David Mattern, Ivana Dukanovic, and Katherine Merk. And our client representative from Google, Carletta Higginson, is here in the back as well. Thank you.

JUDGE BARNETT: Thank you.

MR. MARKS: Good morning. I'm Benjamin Marks from Weil Gotshal on behalf of Pandora Media. With me today are Steve Bene, general counsel of Pandora Media, and Katie Peters also of Pandora. My colleagues Peter Isakoff, David Singh, An Tran, Jacob Ebin, Jen Ramos, and

Meredith Santana. And I will be introducing the members of our team during the proceeding.

JUDGE BARNETT: Thank you, Mr. Marks. Spotify?

MR. MANCINI: John Mancini of Mayer Brown on behalf of participant Spotify. I have with me at counsel table my colleague Rich Assmus, my associate Xiyin Tang, my associate Peter Schmidt. In the back of the room, I have my associates Kristine Young, and my associate Anita Lam, and our paralegal Lauren Hodge. Our client representatives in attendance in the back of the room are Lucy Bridgwood and Adam Chen of Spotify.

JUDGE BARNETT: Thank you.

MR. ZAKARIN: Good morning, members of the panel. My name is Don Zakarin from Pryor Cashman. I represent the National Songwriters Association International, the National Music Publishers Association. With me at counsel table are Ben Semel, also of Pryor Cashman, Jim Janowitz, Frank Scibilia, Josh Weigensberg, Lisa Buckley, Marion Harris, Robert Michael. Steve Najarian is working with us on tech. In the back are our clients David Israelite, Natalie Madaj, Danielle Aguirre, and Eric Carey.

And I think that covers our list.

JUDGE BARNETT: Thank you.

MR. JOHNSON: Good morning, Your Honors. My name is George Johnson. I'm from Nashville Tennessee, and I'm a songwriter and self-publisher, and I'm representing myself and all other songwriters and publishers subject to the compulsory license. Thank you.

JUDGE BARNETT: Presumably, Mr. Johnson, not those songwriters and publishers who are members of the representative organizations here? I know you are a member of one, but you have chosen to represent yourself?

MR. JOHNSON: Correct, yes.

JUDGE BARNETT: Okay.

MR. JOHNSON: Thank you, Your Honor.

JUDGE BARNETT: Thank you. Mr. Marks, I've been told that you're leading off, so you may begin your opening statement on behalf of Pandora.

OPENING STATEMENT ON BEHALF OF PANDORA

MR. MARKS: Thank you, Your Honor. Good morning, Your Honors. As I mentioned, I am Benjamin Marks from Weil Gotshal on behalf of Pandora Media, and it is a pleasure to be before you again.

You will be hearing from three Pandora

executives over the next several days, including Adam Parness, Pandora's head of publisher licensing and relations; Christopher Phillips, Pandora's chief product officer; and Michael Herring, Pandora's president.

You will remember Mr. Herring from the web for text proceeding. You'll also be hearing --

JUDGE BARNETT: Seems like it was only yesterday.

MR. MARKS: You will also be hearing from Pandora's economic expert, Professor Michael Katz of Berkeley's Department of Economics and the Haas School of Business, as well as from several other experts that Pandora is jointly offering with other Services.

Professor Katz will be here on Monday, and Mr. Pakman, and Dr. Zmijewski will appear later in the proceeding.

When we were last before you in Web IV, Pandora's offerings were limited to a non-interactive DMCA-compliant Internet radio service. Pandora offered an ad-supported tier and a much smaller subscription tier. It did not need mechanical rights at all. Pandora was at that time and remains today the largest music streaming

service in the United States.

As you heard in Web IV, some users want a lean-back listening experience like Pandora Radio or broadcast radio, and some users want more control over what they hear and use on-demand services or collections of music that they had purchased. And many users want access to both experiences, and which one they use at any particular moment in time will depend on their mood, the time of day, and what they are doing.

Mr. Phillips will explain that many Pandora users have been using Pandora in combination with other services and leaving Pandora at those moments when they wanted more control over their listening experience.

For consumers for whom on-demand listening or off-line listening was particularly important, Pandora could not attract them in the first place. To maximize its appeal and to foster new opportunities for growth, Pandora has redesigned its service.

The redesigned service has three tiers. The first tier, known as Pandora, is free ad-supported Internet radio. It does not rely on the compulsory license at issue in this proceeding.

The second tier, Pandora Plus, is also fundamentally a radio-style listening experience, but it is ad-free and it includes limited interactive features. It does not offer on-demand listening, but users have the ability to replay a song that Pandora has selected for them and the ability to listen to their favorite stations off-line such as while on a plane or while exercising outdoors.

Unlike the ad-supported tier, Pandora Plus does rely on the Section 115 compulsory license. It falls within the rate category for limited offerings under Subpart C of the current regulations. It costs 4.99 per month. And it appeals to those consumers that are not willing to pay $9.99 for a full-service on-demand offering for whom that type of product does not have particular appeal.

The third tier, Pandora Premium, is a full-service on-demand product with a number of twists and features, as you will hear, that make it uniquely Pandora. Pandora Premium is a stand-alone portable subscription service under Subpart B of the current regulations. It is in the final stages of beta testing, and it will be introduced to the

marketplace by the end of this month.

It will not surprise you to learn, and Mr. Herring will be here to testify, that the redesign of the service and the development of these new products required an enormous investment of resources and entails considerable risk.

So what does the market for -- marketplace for interactive streaming look like as Pandora enters? There are more songwriters than ever. There are more musical works available for licensing than ever before. There are more sound recordings available for licensing than ever before.

After more than a decade of precipitous decline caused by piracy and the disaggregation of the album by digital downloading, music publishing industry revenues stabilized over the past few years and have now turned the corner. Annual increases in publisher/songwriter revenues from interactive streaming are now outpacing annual declines in revenues from physical sales and digital downloads. But no interactive streaming service has attained sustained profitability in accordance with generally accepted accounting principles.

I will now turn to the competing rate proposals. Pandora's rate proposal is to preserve

the existing rates and rate structure subject only to a few modest adjustments. It preserves the all-in headline rate of 10 and a half percent of revenues. It preserves the greater of royalty structure to provide a per subscriber minimum for both Pandora Premium and other stand-alone portable interactive services under Subpart B and for Pandora Plus and other limited offerings under Subpart C.

This greater of formula ensures appropriate royalty compensation to Copyright Owners in the case of a service that does not monetize effectively, although that won't be an issue for Pandora.

Pandora's proposal preserves the fee structure with different rates for different categories of services to facilitate a diverse array of offerings in the marketplace and to capture all parts of the demand curve.

It preserves the deduction for performance rights royalties that are paid by the very same services to the very same rights holders for the same uses of music that has been a feature of the Section 115 license for interactive streaming since its inception.

Pandora's proposal eliminates the

mechanical-only floor for Subpart B, and there is no mechanical-only floor for Subpart C under the current regulations.

And it also proposes modest adjustments to the terms in order to facilitate family plans and student discounts that help grow revenues and in turn will maximize the royalty payments to the Copyright Owners.

Professor Katz will be here on Monday to explain why this proposal satisfies the Section 801(b) factors. He will explain that the best available benchmark for rate setting here is the 2012 settlement agreement that led -- that provides the basis for the current rates and terms.

That agreement involves the same rights, the same uses of music, a number of the same parties. It is a relatively recent agreement and, as Professor Katz and others will explain, the fact that it was negotiated in the shadow of the compulsory license -- that is, either side could have litigated a rate proceeding rather than agree to the terms -- that's actually a virtue for rate setting here, not a vice.

Professor Katz will also explain why Pandora's rate proposal is corroborated by the

recent settlement between the Copyright Owners and their record label counterparts on the mechanical royalty rates for physical distribution and digital downloads covered by Subpart A.

If anything, that agreement on Subpart A suggests that the rates proposed by Pandora for Subparts B and C are too high. Amazon, Google, and Spotify have made proposals that are not exactly identical but are broadly similar to Pandora's.

So what do the Copyright Owners propose? A radical change to the rate structure, including the introduction of a per play royalty minimum, to eliminate the deduction for performance rights payments made by the same services to the same rights holders for the same uses of music, massive increases in effective rates, increases that are best measured in orders of magnitude, not mere percentages, to collapse the ten different rate categories negotiated in 2012 to accommodate the wide variety of business models in the marketplace into a one-price-fits-all rate that would not, and to impose a new late fee, even when services are using best practices and all available information to pay on time.

Much of the next five weeks will be

devoted to why the Copyright Owners' proposal does not even come close to satisfying the objectives of Section 801(b), the relevant rate setting standard here, and that topic will be addressed in the opening statements of counsel for other services.

So let me just close with a few brief observations about what the effect of the Copyright Owners' proposal would be on Pandora, if it were adopted.

And at this point, Your Honors, we're moving into restricted territory. To minimize disruption, I will conclude my remarks with this restricted session, the Amazon presentation is also restricted, and then we will return to open session.

JUDGE BARNETT: Okay. Thank you. Any person in the room who has not signed a certificate of nondisclosure or who is not otherwise permitted under the protective order to view restricted material or to hear confidential information, would you please wait outside.

(Whereupon, the trial proceeded in confidential session.)

O P E N S E S S I O N

OPENING STATEMENT ON BEHALF OF SPOTIFY USA

MR. MANCINI: Good morning, Your Honors. John Mancini, again, on behalf of participant Spotify USA, Inc.

In the past century, the music industry has seen a series of transformational technological innovations that have altered, shaped, and redefined the landscape for music.

Among those innovations were early on radio cassettes, CDs, and recently PDDs and now on-demand interactive streaming. Streaming, the latest format shift, has changed the music industry landscape to the benefit of everyone in the ecosystem, including consumers, songwriters, record labels and, of course, music publishers, as you will hear.

The record in this proceeding will show streaming generally and Spotify in particular has saved the music industry, which had been in broad decline due to rampant piracy. As the testimony will show, Spotify as the undisputed leader in interactive streaming, has revolutionized the way consumers access and enjoy music, accumulating over 100 million monthly active users globally with 50

million users on its paid service.

The record in this proceeding will also show that Spotify has invested literally hundreds of millions of dollars to develop its user interface and to surround that interface with the most robust technology platforms in the industry.

Those platforms allow users to connect to one of the largest on-line music catalogues and introduce them to new artists and content that they would have never have otherwise been listening to.

In addition to developing those robust tools to improve the user experience, Spotify has also invested millions in improving the fortunes of artists and songwriters. You will hear that Spotify's creator division, an entire division of the company dedicated to artists, has revolutionized how artists connect with their fans and opened up new markets that may have never -- that they may have never realized before.

You will hear how and why Spotify's substantial investments in technology have created the best-in-breed software and algorithms that enhance that interconnectivity between artists and their fans. In fact, you will hear that just in the last year, 8,000 artists received over half of their

listeners in a month from just one of Spotify's music delivery products.

Yet, despite the popularity of Spotify, it has failed to deliver a profitable business. And it is not alone as you have already heard. In fact, there are other digital services in even worse shape.

Companies like Deezer and Rhapsody have struggled to even survive. All of these Services have struggled in large measure because of the enormous royalty rate for licenses. In Spotify's case, those royalty payments constitute 70 percent of its revenue.

For Spotify and other streaming services to have a viable business, they will need rate reductions, not increases. The increases sought by the Copyright Owners risk the very survival of this transformational industry and, in particular, Spotify and its ad-supported tier, which they make no mistake that they want closed down.

If Spotify ceased to exist, the consequences would be dire for the entire music ecosystem, as consumers will simply return to piracy or other forms of free music which actually generate zero mechanical royalties.

That return to piracy would reverse the positive industry trends that you will hear about. Part of the reason Spotify, in fact, was launched was to offer a legal alternative to piracy, a phenomenon that made consumption limitless and boundless by consumers.

In piracy, users found a remarkable simple means of downloading free music, in large volumes of gigabytes, at no cost, easily and quickly. No wonder, then, that record sales, and with it the mechanical royalties from CD sales, dropped precipitously. The challenge was to find a way to monetize the value that consumers found in piracy.

Spotify came up with that answer. It embraced the consumer's desire to move away from an ownership model to an access model and one that was superior to piracy and yet paid rights holders. So Spotify's Premium model, as it is sometimes referred to, was born. The Premium model works as a twofold funnel. First, it moves users frictionlessly to piracy to a legal ad-supported free-to-user tier which pays rightsholders.

Second, it converts those users to its premium service, and it has been successful at that,

where users pay a monthly subscription fee of $9.99 per month.

The model has worked, and today Spotify has 50 million paid subscribers. This model has worked because Spotify has convinced users to pay for music again, not an easy task.

It did so by making millions of tracks instantly available in an intuitive, easy-to-use interactive format. It also improved upon all existing models with advanced algorithms. Among those innovative features, Spotify developed tools to curate songs to moods, interests, patterns of listening.

It enhances that music experience and user connectivity in ways never done before. Take tools like Discover Weekly and FreshFinds, which you will hear about. These use algorithms to build case profiles on each user. Then they identify lower familiar songs for those users' tastes. And tools like Spotify's Fan Insights help connect artists with fans, ensuring that all parties, rightsholders alike, will benefit.

Spotify's rate proposal in this proceeding likewise seeks to continue those benefits for all parties. It essentially seeks a rollover of

the existing rates with removal of certain inefficiencies, namely the 50 cent per subscriber royalty floor, discounts for family and student plans and computing the subscriber-based 80 cent subminimum, and revisions to the definition of service revenue to exclude expenses for app store fees, carrier billing, and credit card transaction fees.

Respectfully, Spotify suggests this Board should adopt its rate proposal because it is the most consistent with the 801(b) factors. Additionally, Spotify's rate proposal allows it and the other services that have transformed the music landscape to remain as viable businesses.

Among the risks facing Spotify today are its high content costs and these inefficiently structured royalty rates. For example, due to those inefficiencies which we seek to be removed, Spotify actually pays above the 10.5 percent headline rate. These inefficiencies disincentivize Spotify to price efficiently in order to capture users that are otherwise unable to pay 120 dollars a year for music but are willing to pay more than zero. Capturing that revenue doesn't just grow the pie for Spotify. It grows it for the entire music industry, including

rightsholders.

Just briefly, when this panel hears about the 801(b) factors, we respectfully submit that they will support Spotify's proposal. First, maximizing availability of creative works. Spotify's entire service has been built around maximizing the availability of creative works to the entire industry and exposing songs to users that they have never been listening to before.

Second, Spotify is not making a fair income, and the evidence will show that the publishers indeed are and are doing better than ever. Not a single digital service has managed to reach profitability and certainly not Spotify.

Third, Spotify and Services take on greater risk, cost, capital investment. There is no question that the Services and particular Spotify take on greater capital contributions. You will literally hear testimony of hundreds of millions of dollars invested in enhancing the user experience and enhancing connectivity to artists who have never had an opportunity to be heard before.

Finally, disruption. Spotify's rate proposal merely asks for extreme caution in the next five years. The music industry could be stalled.

These advances that we have been speaking about could be reversed. Any dramatic change in that rate structure could be devastating.

In fact, in Spotify's instance, the rate proposal advanced by the Copyright Owners would literally increase Spotify's mechanical royalty rate for its overall services by 26-fold and 156-fold for its ad-supported tier, making it very clear that they seek to shut down that tier.

To say that this is a sharp increase and that it is disruptive is an understatement, of course. And, in fact, the Copyright Owners' proposed greater of per stream or per user structure also flies in the face of this Board's preference for continuing currently operative rate structures.

In fact, not only does the Copyright Owners' rate proposal ignore the 801(b) factors, their proposal lacks a firm economic basis.

They advocate for the use of a "market determined ratio" between royalty payments for sound recording rights and musical work rights and in a hypothetical unconstrained market mechanical license. That is not the standard for this proceeding and it is not even the standard under a willing buyer, willing selling standard.

Conversely, the economic bases for Spotify's benchmarks are both intuitive and sound. Spotify's expert, Dr. Leslie Marx, uses agreements reached by the very consenting parties closest in time to this current proceeding; namely, the 9.1 cent PDD rate voluntarily agreed to by the Copyright Owners here.

In addition, Dr. Marx also uses the Subpart B rates as another benchmark as it was the product of a settlement between Copyright Owners and streaming services as recently as 2012. Because the Copyright Owners were consented parties in both settlements, there are no better proper benchmarks left.

In closing, the music industry has just begun to turn the corner for the benefit of all participants in the ecosystem. The Board should be wary of changing the rate structure in a way that stalls that advancement.

Spotify's rate proposal seeks to mostly preserve the status quo and grow the pie for all parties, adjusting certainly for some inefficiencies. Our rate proposal ensures that rightsholders will continue to be compensated fairly, members of the public will have access to

music that they have never had an opportunity to be heard before, and streaming services will finally develop into sustainable, viable, and profitable businesses to the benefit of all participants -- and make no mistake about it -- including the songwriters and publishers.

Thank you, Your Honors. I will turn my time over to Mr. Steinthal.

JUDGE BARNETT: Thank you.

Mr. Steinthal?

OPENING STATEMENT ON BEHALF OF GOOGLE

MR. STEINTHAL: Good morning, Your Honors. It's good to appear before Your Honors again after a very brief stint in Web IV, when I made a presentation for NPR and then disappeared. I wish I could have delivered a settlement here as well. But that was not in the cards, I'm afraid.

JUDGE BARNETT: Your presentation in Web IV was brilliant.

MR. STEINTHAL: Thank you. Today I am here on behalf of Google Play Music, the last of the four Services participating here, those other than Apple, whose rate proposals coalesce around the long-standing preexisting Section 115 structure.

Those proposals coalesce around the

existing rate structures for good reasons, many of which you have heard already from my colleagues, and for the additional reasons you will hear about from Google's three fact witnesses and its expert, Dr. Greg Leonard.

In the few minutes available to me today, I hope to introduce you to the Google Play Music product offering, to identify the witnesses from whom you will hear on behalf of Google, and, finally, to summarize Google's rate proposal and benchmark evidence which supports our rate proposal and at the same time undermines that of the Copyright Owners.

From time to time, I will put some slides up. I don't want that to be the focus of attention. But there are -- in particular, there is one slide, in order not to clear the courtroom, I will focus Your Honors on the information on a slide that won't be available to the rest of the courtroom.

So let's start with the Google Play Music product offering that implicates the Section 115 license. As Mr. Joyce of Google will explain, it is a monthly on-demand subscription offering at 9.99 a month. It provides access to 40 million recordings on demand. Google Play Music was launched shortly

after the phonorecords II settlement with the understanding that publishing royalties, other than those that were the subject of its direct licenses with publishing companies, which I will get to, would be based on the terms set forth in the phonorecords II settlement.

The evidence will show that Google Play Music has sought to differentiate itself from others in the market by a few things. It provides two tiers: Its pay on demand subscription tier and a free-to-user tier that provides certain offerings, not subject to the Section 115 license.

The free tier in turn has two components, a non-interactive music streaming service which Google developed after acquiring a company called Songza and its technology, which enables Google Play Music to offer users innovative play list creation services, and it offers -- Google Play Music offers as well in its free tier a free-to-user music locker offering that enables users to access up to 50,000 tracks in the cloud which the users have previously acquired.

Google utilizes the features of its free tier, both to differentiate itself in the market of on-demand services and also as a promotional tool to

funnel those free users to its subscription on-demand offering. Google's investments in these free offerings foster user engagement and create an excellent opportunity to grow the ranks of Google Play Music's subscription on-demand offering.

They also enhance the opportunities for consumers to purchase music in the form of permanent digital downloads and physical sales from the Google Play Music store, which, of course, generates royalties under Subpart A for the Copyright Owners.

Now, you will undoubtedly hear a lot from the Copyright Owners -- you already have in the motion practice and you will at trial -- in the form of pure conjecture about how, they say, the Google Play Music service benefits other revenue streams of the broader Google, Inc.

That is simply not what the record will show. You will hear to the contrary from Ms. Levine of Google and Dr. Leonard that the Copyright Owners have it upside down. It is Google Play Music as a service offering which benefits tremendously from the hundreds of millions of users of Google Search and Google Maps and the like who already use Google and can be exposed, while doing so, to the Google Play Music offerings. They have got it totally

upside down on this issue. Google Play Music is the one, the smaller service that benefits from the platform that preexisted the Google Play Music offering within Google.

Now, relevant to the 801(b) factors, the evidence will show that Google has invested heavily in growing the Google Play Music service. Beyond the investments I have already outlined, the testimony will show that Google has provided to prospective subscribers extensive free trial periods in which Google Play Music pays royalties to the Copyright Owners while bringing in no revenue in the hope that the free trial users will get hooked on the service and become paying subscribers.

Let me just talk briefly about the economics of Google Play Music's business. In a certain sense, since its launch, it has been a great success. As Messrs. Joyce and, if the panel permits us, Mr. Agrawal will explain, subscriber numbers have grown at a rapid pace, but you will also hear from them and from industry expert David Pakman about how economically challenging the subscription interactive music business is, even under existing royalty burdens.

Never mind what would be the case if the

Copyright Owners' proposal was adopted in this proceeding.

Let me turn now to Google's specific rate proposal. Google proposes the following rate structure for Section 115, Subpart B activities, which conform substantially to the preexisting rate structure with a couple of changes consistent with the marketplace deals that Google relies on.

Google's proposal is depicted on slide 7, so this is one I will point you to, and it is available to everybody. The proposed rate structure has a top-line rate -- well, it is a greater of rate structure like the existing structure. The top line rate of 10 and a half percent of service revenue, just as in the preexisting structure, and then it's subject in the greater of formula to the lesser of a per subscriber, per month minimum based on the preexisting Section 115 per subminimum or a stated percentage of the Services' expenditures for sound recording rights, the TCC figure that you will often hear about, the content cost percentage.

This is the same structure as currently exists in step 1 of the calculation of rates under Subpart B, except that Google proposes that the TCC percentage be modified somewhat to bring it in line

with the Subpart A rates, as I will address in a moment.

The Copyright Owners' recent Subpart A voluntary settlement is particularly instructive and supportive of Google's proposal. Dr. Leonard will demonstrate that the average per composition mechanical license rate paid under Subpart A reflects approximately 10.2 to 11.3 percent of revenues from the sale of the sound recordings embodying those compositions using the revenue definition proposed by Google and others in this proceeding.

This confirms that the 10 and a half percent headline rate under the preexisting rate structure, as well as the headline rate in Google's rate proposal in this case, is reasonable.

Moreover, the recent Subpart A settlement also reflects that for Subpart A activity, the Copyright Owners have manifested a willingness to accept a fixed mechanical royalty through 2022 in the face of increasing download sale prices, prices increasing above the 99 cent previous average, and the correspondingly increasing payments to record labels.

This trend implies that mechanical

royalties for Subpart A activity will be at or below 13 and a half percent of the average compensation received by sound recording owners for sales of downloads during the upcoming license period.

When you look at what the mechanical royalty is, the 9.1 cents or maybe it is 9.5, depending on the duration of the song, as a percentage of what the average sales price is and you look at it over the term, we're talking about a number that will be at or below 13 and a half percent of that sales price.

And that is the basis for Dr. Leonard's endorsement of lowering the TCC minimum fee component in Google's proposal from 21 percent to 13 and a half percent. I would note, however, that under Google's current pricing, that change wouldn't affect the amount of compensation to the Copyright Owners.

Now, Dr. Leonard will explain why the Subpart A benchmark is so compelling economically. First, it involves the same rights; that is, the mechanical rights that you are charged with setting fees for in this proceeding.

Second, it involves the identical sellers in the same market context; that is, unconstrained

record labels on the one hand and publishers subject to the Section 115 compulsory license and 801(b) factors on the other.

Third, the Subpart B rates for on-demand streaming are for activity conceded by the Copyright Owners to be activity that is directly competitive with, indeed it is said by the Copyright Owners that the Subpart B streaming activities substitute for, the very purchase activity governed by Subpart A.

So we have absolute mirror images between Subpart A and Subpart B. And the evidence will show that the Copyright Owners agreed to the Subpart A settlement in 2016 knowing full well that the Subpart B activities were the direct corollary of the Subpart A sales that were being displaced by the Services' on-demand streaming activities.

Now, I have been talking about the rate component of Google's proposal. Another important component of its proposal is that it is an all-in rate for both public performance and mechanical rights.

The expert and fact testimony will demonstrate that the rate structure for mechanical rights should involve an assessment of the overall all-in value of the publishers' rights associated

with distributing on-demand streams.

The performance and mechanical rights are perfect complements of one another from an economic perspective. There is no stand-alone value in the mechanical right associated with the delivery of an on-demand stream, and the economic testimony will bear that out.

Indeed, this panel was faced with a similar issue in the context of Web IV with the relationship between the Section 112 ephemeral copy and the Section 114 performances at issue in that proceeding.

It is instructive that the former Register of Copyrights, Marybeth Peters, previously commented that the relationship between the rights covered by Sections 112 and 114 is directly analogous to the relationship between incidental mechanical and public performance rights in compositions associated with interactive streaming. Her quote is on slide 10 in the deck that you have.

The testimony you will hear will demonstrate that this panel should view the all-in value of such perfectly complementary rights in arriving at your fee determination in this case. I say that even though, as the Copyright Owners

repeatedly carp about, the rate for the performance right is not one that Your Honors are charged with setting.

But that observation says nothing about the wisdom as a matter of economics and to address the 801(b) factors of ensuring that the total compensation derived from the distribution of on-demand streams and limited downloads does not exceed a reasonable level consistent with the 801(b) factors.

There is further support for Google's proposal in two sets of agreements that you will hear about during the trial. First, the prior agreements between the Copyright Owners and the Services setting forth the existing Section 115 rate structure provide broad support for Google's proposal.

As Ms. Levine will testify later today, streaming services have been developing and evolving since the early 2000s, and a lot of thought was put into the preexisting rate structures established by the prior settlements among the Services and Copyright Owners.

And the trial evidence will show that by the time of the 2012 phonorecords II settlement

establishing the current rates that we're operating under, all of the parties were well aware of the increasing importance that Subpart B services were playing in the music distribution marketplace.

The Copyright Owners can't keep their heads in the sand that somehow or other as of 2012, the world didn't know that the music world was all about on-demand streaming services. Everybody knew it. To say otherwise is just not supported by the record.

The second set of agreements supporting Google Play Music's proposal are comprised of Google Play Music's numerous direct deals with publishers, direct deals with major publishers and Indies, large and small publishing companies, which provide emphatic additional support for Google's proposed rate structure in this case.

You should note that the vast majority of the works in the Google Play Music service are licensed via direct deals, not the Section 115 statutory license.

In the interest of not having to clear the hearing room, I'd like to direct the panel to slide 12 in the deck that you have.

This slide sets forth the structure of

the Google Play Music publishing deals that cover the vast majority of the works that are streamed on Google Play Music's service.

It sets forth, you will see on the slide, the headline rate, the alternative minimum fee components of those deals, the scope of the rights conveyed, and how, if at all, the subject of a mechanical rate floor fee is addressed.

Suffice it to say that all of these deals support Google's rate proposal in this case.

Finally, let me turn briefly to the Copyright Owners' rate proposal. The Copyright Owners' proposal is perhaps most noteworthy insofar as it is entirely divorced from the very 801(b) policy factors that by statute Your Honors are charged with applying in this case.

The Copyright Owners have developed a model that is based on benchmarks from an entirely unregulated market, the one associated with the licensing of sound recording rights to interactive music services, which this panel already determined in Web IV is not a workably competitive marketplace.

And when confronted with the 801(b) standards, the Copyright Owner experts blindly suggest that in response to a proposed more than

100 percent increase in mechanical royalty payments, the interactive streaming industry should just reorder itself, including by shuttering service offerings used by tens of millions of consumers.

The problems with the Copyright Owners' model for rate setting go well beyond its being anchored in a noncompetitive licensing market. There are models based on wholly non-comparable sellers. It involves wholly non-comparable rights. And it involves a plethora of demonstrably unproven assumptions and mathematical errors as to make it extremely unreliable, to say the least. That subject, I will leave to the details of the expert testimony from all of the Services' economists.

One last thing, in addition to its role in ensuring widespread disruption in the interactive streaming industry, the Copyright Owners' infatuation with a per play rate in this proceeding will be shown to have no meaningful precedent in the musical works benchmark agreements.

The numerous Google agreements are so valuable in this regard, none support such a metric. And the testimony will be that it is antithetical to the whole concept of on-demand product offerings, where you are trying to sell users on access to all

the music they want, whenever, and as often as they want it, to burden users with a surcharge if they engage in precisely what the service offers users the ability to do.

Google is trying to build user engagement with its Google Play Music subscribers to keep its subscribers happily paying their monthly subscription fee far into the future. But a per play metric is likely to drive a directly contrary result.

I thank you for your time and patience, and I kick it over to Apple.

OPENING STATEMENT ON BEHALF OF APPLE

MS. CENDALI: Good morning. Again, I'm Dale Cendali at Kirkland & Ellis on behalf of Apple.

This Board has a tough job of trying to balance numerous competing interests. First, there is Services which make music available to consumers in innovative ways and play an important role in exposing artists to new audiences.

Second, there are the publishers and songwriters who are responsible for creating music. Third, there are the consumers whose interest in interactive streaming seems to grow each day. On top of that, the Board has the challenge of adopting

a rate that limits disruption in the industry as a whole.

As I will explain and as you will hear over the next five weeks, of all the proposals submitted in this proceeding, Apple's proposal best balances these competing interests under the 801(b) factors as it is simple, transparent, and fair.

You heard from the other Services a few minutes ago. Soon you will hear from the copyright holders. What Apple's witnesses will make clear is that Apple's proposal strikes a middle ground between the competing interests, not because it's a compromise, but because it shares the best ideas from everyone.

It uses key benchmarks other Services support and a structure, the per play rate, that the Copyright Owners themselves have advocated. And it puts them together to generate one simple easy-to-implement rate.

So this leads to the question is, well, what is Apple's proposal? Well, here it is. As this slide shows, Apple is proposing an all-in rate of .00091 per play for all non-fraudulent streams greater than 30 seconds, for all interactive streaming services.

There are no other prongs and no complicated calculations. Apple's proposal is just one fixed number that all interactive streaming services would pay every time a user listens to a song.

So why is Apple proposing this rate and why does it make sense? Well, as you will hear from Apple's expert, Dr. Ghose from NYU, the current rate structure is overly complicated and lacks transparency because royalties depend on the amount of revenue a service generates.

This means you can have one company pay one rate for a stream, and another company pays a different rate. And because of that, songwriters may receive different compensation even though it is the same song being streamed.

Apple doesn't think it makes sense for artists to be dependent on the business success of the Services that use their music. They should get a consistent, predictable, and transparent per play rate, and then it is up to the Services to run the most innovative and efficient businesses possible for which they can recoup the upside.

JUDGE STRICKLER: Counsel, may I ask you a question? I had seen in your papers the argument

you are making now that Apple's proposal is a simple and uncomplicated rate.

In your arguments, where will you be pointing in the statute or the regulations that simple and uncomplicated is one of the standards that we should apply?

MS. CENDALI: You will hear our witnesses explain that over time. And it is one of the features is -- in the -- in the statute is implementation and efficiency and economic sense. And we believe that simple and efficient are exactly among the principles of the statute. And you will hear more about that as we go through our -- our witnesses.

JUDGE STRICKLER: Thank you.

MS. CENDALI: In any case, to increase certainty and put everyone on the same page, we believe a per play rate is appropriate. And this per play structure is also consistent with the per play and per unit royalty structures in other contexts. For example, just a little over a year ago as you know, this Board adopted a per play rate in Web IV for the royalty that non-interactive streaming services paid for sound recordings. Royalties for interactive streaming should also be

at a per play rate. The other nice thing, as I say, about this proposal is that the Copyright Owners see its benefits as well.

Now, if you agree that this structure makes sense, the issue becomes what the per play rate should be. As you will hear from Apple's senior director of Apple Music, Mr. David Dorn, as well as Apple's expert, Dr. Jui Ramaprasad from McGill, the answer to that question is also simple. As shown in this slide, the benchmarking analysis starts with a .091 all-in royalty for downloads, which applies to all songs under five minutes and 12 seconds long.

The Board set this royalty rate in 2008, following a proceeding just like this one after full input from everyone, after considering the same statutory factors that apply here.

The evidence will show that there is strong buy-in for this rate as the Copyright Owners have agreed that it should be continued for the next rate period as shown by the settlement that they reached with the labels, which is currently before the Board.

Use of the download rate as a benchmark also aligns Apple with -- with other Services.

Pandora's, Spotify's, and Google's experts all point to this download rate as a relevant benchmark.

Now, of course, this .091 benchmark deals with downloads, so the question is how do you convert it to a rate for streaming? And the answer to this question is to look at industry standards for equating streams and downloads.

As Mr. Dorn and Dr. Ramaprasad will explain if this Board permits, there are well respected sources in the music industry that have developed metrics for converting streams to downloads or album equivalents. These sources are routinely used by everybody in the music industry in non-litigation contexts, so they are not made for litigation theories.

And when I refer to sources, what do I mean? Apple looked to industry standards like Billboard and the official charts company, as well as academic experts, and concluded that while any conversion rate between 100 to 1 or 150 to 1 would be reasonable, it would propose 100 to 1 as a conversion rate as that's the rate most favorable to Copyright Owners and, thus, most conservative.

So with the conversion rate factor in place, it is easy to calculate the per play rate for

streaming that Apple proposes. First, you take the download rate of .091 per play, then you multiply it by the conversion rate that one download is equal to 100 streams, and when you multiply these numbers, you get .00091 per stream, Apple's proposal.

This single per play rate for every stream of the song makes sense. Everyone pays the same amount. Everyone receives the amount -- the same amount. It is simple, transparent, predictable, and fair.

Now, while the Copyright Owners essentially agree on a per play rate, unfortunately they disagree on what the per play rate should be, and they add a couple of other problematic features that we are in agreement with the other Services are wrong.

As shown here, they are proposing a mechanical-only rate equal to the greater of a per play rate of .0015 or $1.06 per user. This mechanical-only royalty is a significant deviation from the current rate, which has an all-in headline number to cover both performance and mechanical royalties.

Apple and all the other Services are proposing that the CRB maintain an all-in headline

figure. It reflects the economic reality that interactive streaming services have to pay both mechanical and performance royalties. And it also helps limit uncertainty because services and rightsholders can just look to the statute to know how much total royalties they would pay and receive.

The Copyright Owners are the only ones departing from this practice of using an all-in number. And that's because they want higher fees. Now, as shown here, because the Copyright Owners' proposal limits itself to mechanical royalties, services will have to pay .0015 plus some separately negotiated unknown, unpredictable amount in performance royalties, which undercuts the whole idea.

It is worth noting here that the Copyright Owners criticize Apple's proposal because it's an all-in number and, given current performance royalties, it's possible some services would end up paying nothing in mechanical royalties once performance royalties are subtracted from the per play number.

But this is a red-herring. Under Apple's proposal, the Copyright Owners are always going to get .0091 per play. Anything else is just a

question of labeling, and they can work with their performance rights licensors to decide how to divvy the money up.

Now, the Copyright Owners also add another element to their proposal, which is the complexity of the $1.06 per user prong. As Dr. Ghose will explain, a per user rate is not appropriate because it decouples compensation and demand. Services would have to pay $1.06 for users who never even listen to a single song. That makes no sense.

As Apple's witnesses will explain, the effect of this per user prong is that the royalties that services would have to pay end up being much higher than the proposed .0015 per play rate.

Moreover, even beyond these two structural flaws I mentioned with the Copyright Owners' proposal, the methodologies the Copyright Owners' experts use to calculate the proposed rate are designed to inflate the rate. You will hear testimony on that, and I think this Board will appreciate it.

While there are these flaws in the calculation of the rate, they should not undermine the wisdom of using a per play rate.

In sum, Apple's proposal strikes the right balance among the various participants. It takes the per play rate structure the Copyright Owners want and couples it with the benchmarks relied on by other services. It is simple, transparent, and fair, and a middle ground between these proposals meeting the statutory goals of providing a fair return to all parties, recognizing each of their contributions to the industry.

Now, closely related to Apple's proposal for interactive streaming is its proposal for music locker services. Apple is proposing an all-in rate of 17 cents per subscriber for paid locker services. Like the interactive streaming proposal, that proposal is simple, transparent, and fair.

So in closing, to just step back for one minute and look at the big picture, let's not forget that Apple has always approached the music industry as an innovator and as a leader. When Apple launched iTunes, it offered a similarly simple, transparent, and fair solution for obtaining digital music. That was revolutionary thinking that everybody in this room has benefitted from.

Apple is continuing to innovate and lead today in proposing the .00091 per play rate that is

also simple, transparent, and fair to all. Thank you.

JUDGE BARNETT: Thank you, Ms. Cendali. Before we hear from the Copyright Owners, we will take our -- sorry, they changed our system. They turned off our mics.

Before we proceed to Copyright Owners, we will take our morning recess, 15 minutes, please.

(A recess was taken at 10:36 a.m., after which the hearing resumed at 10:57 a.m.)

JUDGE BARNETT: Good morning, please be seated.

Mr. Zakarin.

OPENING STATEMENT ON BEHALF OF COPYRIGHT OWNERS

MR. ZAKARIN: Thank you, Your Honor.

Your Honors, Don Zakarin, good morning. You have heard from five Services and five sets of counsel. From us, you will -- we have two Copyright Owners and you will hear from only two of us, and we will try to be very direct and to the point.

I'm only going to speak briefly to contextualize the basic themes, some of which you heard this morning, and which you will hear during the course of this hearing.

Then I am going to hand off to my

colleague, Ben Semel, who will take you through the issues and evidence in more detail than I'm going to do.

The rates and terms for the compulsory licensing of mechanical reproductions under Section 115 of the Copyright Act --

JUDGE BARNETT: I'm sorry. Is there a time for Mr. Johnson or has he waived opening?

MR. ZAKARIN: I think Mr. Johnson has waived his time for this purpose, and he will be, I believe, testifying tomorrow, if I am not mistaken.

JUDGE BARNETT: Okay.

MR. ZAKARIN: And we will keep this within the confines of what Your Honors have scheduled.

JUDGE BARNETT: Thank you.

MR. ZAKARIN: In any event, as I was saying, the rates and terms of compulsory licensing for mechanical reproductions under Section 115 of the Copyright Act for interactive streaming services have essentially been unchanged for a decade.

Ten years ago, the interactive streaming business was in its infancy. It was an experiment. There was no assurance that it would ever be more than that.

In keeping with its status as an experiment, the parties, which, contrary to what you may have heard this morning, did not include any of the Services here today, created experimental rates and terms that were intended to allow the industry to evolve and develop while, through a complicated Rube Goldberg-like structure of minima and subminima, would also hopefully protect the songwriters and publishers against the unknown and largely then unknowable ways in which existing and future services might structure their businesses.

Well, as Your Honors know, the streaming business did not exactly catch fire between 2008 and 2012. Instead, it remained an experiment largely unchanged from 2008. As in 2008, the parties did not include a single one of the Services here today. In fact, the only Service in this proceeding that was even in the interactive streaming business was Spotify. And it had only just started operations in 2011 in the United States.

In the nearly ten years since the parties agreed upon rates and terms -- and it was an agreement; it wasn't a determination by the CRB -- and in the five years since the 2012 agreement essentially rolled forward those 2008 rates and

terms, the interactive streaming business has grown from a spore into what has become one of the primary means by which music is delivered to consumers today.

But even that description understates the importance of what this hearing will determine. During the next five years, it is now clear that interactive streaming business will become by far the dominant means by which everyone accesses music.

The rates and terms being set in this proceeding are going to have a dramatic impact on the future course of the United States music business, a business that for more than a century has maximized the availability of extraordinary music that is framed and reflected the lives of succeeding generations, not merely in the United States, but around the world.

The Services in this proceeding and their experts, save and except for Apple, which like the Copyright Owners firmly believe that a per stream rate model is necessary and appropriate given the evolution of the interactive streaming business over the past five years, tell you that there have been no changes in the interactive streaming business over the last five or ten years that warrant any

change; at least, as you will see, do not warrant any upward change but, according to the Services, apparently warrant plenty of downward changes.

And you've heard almost sotto voce during the openings the Services blithely pass over their downward reductions. And they are not so inconsequential, and they are not tweaks, as suggested.

What the Services and their experts won't tell you, however, is how they justify rolling forward the now ten-year-old structure and rates other than based on stasis. Their justification for maintaining the rates and structure, even as they try to eviscerate the minima that in many cases have been the sole basis on which songwriters and publishers have been paid, however inadequately, is, to paraphrase Sir Edmond Hillary's explanation for climbing Mount Everest, because it's there.

Contrary to what the Services say, the evidence is overwhelming, and it is obvious to any observer, the changes wrought in this industry in the last five years have been seismic. Five years ago, digital downloads were the primary driver of mechanical royalties, continuing their replacement of physical recordings.

Since 2012, and the evidence will show this, mechanical royalties from digital downloads have plummeted as consumers increasingly abandoned the ownership model that existed since the days of piano rolls, which goes back before my time, and embraced an access model embodied by interactive streaming.

Five years ago, the players in the interactive streaming business like Spotify were essentially startups. Over the past five years, tech industry giants, Amazon, Apple, and Google have joined Spotify, but unlike Spotify, at least the current iteration of Spotify, these giants have multiple business lines, providing multiple revenue sources, many of which they have linked to their music streaming businesses, artfully employing the current rate structure to gerrymander revenues away from their streaming services and any royalty payment obligation.

The success, in particular, of Amazon in bundling music with other arms of its business without the inconvenience of having to pay mechanical royalties on any portion of the incremental revenues that music helps create has not been lost on Spotify, which is already in the

process of creating its own bundles.

Small wonder, then, that Amazon, Google, Pandora, and Spotify want to maintain a structure that has facilitated the bundling of music in ways that use music to help drive revenue to their businesses without having to account in any way for those revenues to songwriters and publishers.

During this hearing, several of the Services' witnesses will purport to tell you about -- all about the 2008 and 2012 negotiations and their supposed intended purpose, in an attempt to convert those settlements into not only benchmarks but essentially immutable benchmarks, subject, of course, to the reductions the Services want to make to those otherwise immutable benchmarks.

However, you are going to hear from only one witness, David Israelite, who was actually involved in the negotiations ten years ago and again five years ago that produced the existing rates and terms. And the testimony in his direct and rebuttal statements confirm that those existing rates and terms were experimental, they were intended to be experimental, and as the published regulations made clear, were expressly not intended to be

precedential.

It is precisely the opacity of the current rate structure and how it encourages bundling by businesses that have multiple business lines in a way that diverts revenue from the royalty calculation base, that explains why you have heard and why you will hear the following themes played out during this hearing and to which we will be responding.

First, the Services claim they are being choked by excessive royalty payment obligations, pointing to and hiding behind Spotify's ad-supported service as if it was some sort of a human shield, invoking the minuscule rates Spotify pays to distort downward the average payments by all of the Services as if Spotify's payment rate, which is minuscule, should be the standard applicable to all as compulsory.

Ignoring the billions of dollars in revenue they receive that is inextricably linked to their music services, ignoring the massive discounts that they provide in competing with one another, discounts that dwarf the effect of any increase caused by the rates being sought by the Copyright Owners, they will tell you they are losing money,

and if the rates are increased, they will have to exit the business.

The evidence will conclusively refute this famed tale of woe. And I would note when you hear about the choking royalties and you have heard about the 70 percent this morning, most of it, and I mean by far the greatest amount of it by far, goes to record labels, not to Copyright Owners, not to writers, and not to publishers. And those rates of which they -- which they are decrying here, so high, ends up with 70 percent, most of them are the product of their negotiations with labels, were the product of a compulsory rate set in an agreement ten years ago.

Two, in contrast to their claim of impoverishment and impending doom, pointing to the Copyright Owners' sources of revenue, other than declining mechanical revenues, including performance income from streaming, the Services will argue that the music publishers, and presumably the writers whom the Services ignore, remain profitable and, therefore, a rate increase is unwarranted. Here again, the evidence will demonstrate otherwise.

As streaming has replaced the sale of records and digital downloads, mechanical royalties

have diminished. And other sources of income and other rights of Copyright Owners under Section 106 have nothing to do with this proceeding.

And I would add, because Your Honors can't address performance income, you can't assure that any mechanical rate that takes into account performance income will not be materially undone by other tribunals, such as the rate court, and you can't assure that other forms of performance income won't be affected by streaming performance income.

It is not before you. But they want you to account for it and deduct it from the mechanical when you have no control over it.

Three, the Services will tell you that the existing rate structure enables them to tailor their services and prices to different types of consumers who have different levels of interest in paying for music and the Copyright Owners' structure would supposedly prevent the creation of differing pricing tiers and drive some consumers from the market.

There will be no evidence to support this. And, in fact, the Copyright Owners' structure, not that of the Services, actually lends itself to creating individualized tiers. So that,

for example, instead of a unitary subscription fee, consumers can pay some determined access fee and then only pay on a per stream basis for the music they actually want to and do consume. No more, no less.

Since the Copyright Owners -- this is four. Since the Copyright Owners settled with the record labels for Subpart A rates and terms by rolling them forward, the Services tell you so too should the Subpart B and C terms be rolled forward.

This false equivalence ignores that the Subpart A settlement recognized that, given the accelerating downward spiral of the digital download and physical recording business, made no economic sense to seek some nominally higher royalty rate from a declining business in a complicated and expensive proceeding. It just wasn't -- it made no economic sense whatsoever.

The evidence will show that the Copyright Owners -- and I echo here Ms. Cendali -- has the virtues -- the Copyright Owners' proposal has the virtues of simplicity, transparency, and consistency with how mechanical royalties have for 100 years been calculated on a per unit basis. It provides a fair return to the Copyright Owners. And I now

yield to my partner, Ben Semel.

JUDGE BARNETT: Thank you.

MR. SEMEL: Thank you. Good morning, Your Honors.

While there were certain more hyperbolic arguments that we have just heard from the Services that we would like to address up front, we're mindful of the clearing of the courtroom, so we have moved our restricted material toward the end, so that we only have to do one clearing. And I expect we have about 15 to 20 minutes of public material that we can do, and then we will only have to do one clearing.

I also want to apologize for not having paper copies of the slides we will be showing. Our presentation is not really conducive to paper copies as it has a number of built slides in it. And I don't know if we have this up yet. As I say that, I bring up the most boring slide of the day.

There are two components to this proceeding that I think are very distinct. One is dealing with the rate structure and dealing with the rate. Obviously, you cannot determine the rate until you determine the structure, and we will look at these both in order.

There are, as you have heard in pieces from the different Services, three basic rate structures that are being proposed in this proceeding. The Copyright Owners have proposed a combination of per play and per user rates. Apple has proposed a per play rate only. Their rate includes performance royalties in a manner. I also note that that rate doesn't include any payment for access. So under their rate, users would be able to have access to the repertoires of publishers and songwriters, 30 million songs, and would pay nothing for that access.

And then the four Services have various iterations of a roll forward of the current rate structure. And first, I would like to look at that -- those roll forwards and to add a little detail to some of the points that Mr. Zakarin just made.

There has been tremendous entry into the market in recent years, as this shows. On this, you will see where phonorecords I and II are on this time line, and then all of the participants are in the red boxes on the bottom. And you see it starts to cluster even more as you get towards the present. And that's not happening in a vacuum.

What this is going along with is a

tremendous growth in streaming activity in the market. As Mr. Zakarin noted, this is becoming the dominant form of music distribution in the United States. And you can see the curve, the slope of the curve is increasing and indicates that it may only continue to grow.

JUDGE STRICKLER: Question for you on the vertical axis. It says total streaming in billions. Those are per stream or per --

MR. SEMEL: Those are monthly streams in billions. So that is actually --

JUDGE STRICKLER: User streams?

MR. SEMEL: Correct. So each -- so, basically -- so where you see the 20 there, that is 20 billion streams per month along those months.

JUDGE STRICKLER: Thank you.

MR. SEMEL: And you see also where phonorecords I and II fall on this graph. You see it was embryonic at the time of those proceedings. Streaming activity barely existed when these proceedings occurred. And to their credit, the participants understood this, and they built into their agreement the understanding that it was an experiment, that it was a trial.

And I note Your Honors to some extent

already addressed this. I obviously did my presentation before you spoke this morning, but you are aware that as part of this proceeding the rates here are to be established de novo and that the current rate structure is not something to be carried forward. And that was really not just a function of the expiration of the term, but also part of the deal.

It was part of the understanding of the parties that they were putting together a somewhat whacky experimental trial in a period where they didn't really even know what was going to happen, and that part of the deal was, well, we're not going to -- we've got to do this over from scratch and build this up.

And it is built in not only in Subpart B and the regulations, but also Subpart C has the same provision.

Now, of course, Your Honors could reach an independent determination of rates that is similar to the current rate structure. But as you noted this morning in your remarks, that would have to stand on its own two feet. Such a determination would have to have an independent evidentiary grounds, rather than just be the past becomes the

future.

And there is the rub. And for a moment, I think it is important to look at what you are perhaps surprisingly not going to see over the next four to five weeks.

And that is that you are not going to see an evidentiary basis for the current rate structure system. You will hear a lot of arguments about how the current rates are good and they should roll forward, but you will not get an explanation of what these terms are. And mind you, they are not intuitive terms.

This is a chart that's produced by the Harry Fox Agency. It is cited in the reports of experts on both sides. And I will note, it is a little bit of a red flag when your economic experts have to turn to visual aids by third parties just to understand what the rate structure is.

Now, this is for one service, the stand-alone non-portable subscription streaming only service. It has got multiple components to it. As you see, it has got -- you have to figure out percentage rates, you have to figure out per subscriber rate, you have an either of with sound recording percentages. You are not going to get

testimony to explain how -- why 22 and 18 and 10 and a half and 15, where they came from, what was the economic basis for that.

Also, they are grouped into lesser than and greater than prongs. And you move to the bottom, you've got performance royalties. They are getting taken out. You have a 15 cents there at the bottom. No one is going to tell you where that 15 cents comes from or why it is there.

And then you do some math, and you come out with a per-play rate that gets paid. Now, mind you, that was not the proposal. That's one model. The proposal that the Services are asking for is this, and this is different, each one of threes models. Each one of these models has a set of mechanisms that is different from the other ones. And they go on and they go on and they go on and on. And they are still going on.

And here we go. This is rough math. We've got 79 mechanisms in here. These are different minima, different percentage rates, different greater of's and lesser of's. And it might come as a surprise that Your Honors are not going to hear any testimony about where this came from or how -- what is the -- as you noted this

morning, the evidentiary basis for this rate structure.

And we wonder how a determination could be written to describe the 79 mechanisms and why they should be the rate going forward for the next five years. The Services are putting that onus on you but not merely putting the onus on you but providing no support for you in making that determination.

And, again, you noted this morning, trying to quote it off the screen, the judges cannot adopt any terms of royalty administration unless the parties present evidence to support their proposed terms.

And, again, you will not hear that evidence in this case. What you will hear a lot of is, hey, things are good, so let's just roll it forward. Status quo is good, and we're going to try and knock down any alternatives and leave you with no choice but the status quo.

And I think as you have noted, that's not really an option. The status quo itself would have to be built on its own two feet. There is not even one foot, there is arguably not even a couple toes that are going to be presented in evidence to

support these rates.

Now, mind you, nor is this something that one would even expect in a CRB proceeding, right? This is Subpart A. Obviously quite different, right? You have a single rate. If you look back at the proposals -- and this is going back to that initial slide with all of these different calculations -- they are still ultimately coming up with the royalty per play.

Payments are being made per play, but what the structure is doing is completely decoupling that payment from any consistent value such that what you are actually getting paid depends on the vagaries of the business models or the decisions or the revenue deferments or whatever of individual services.

I jump ahead to the Copyright Owners' rate proposal, which we believe realigns usage with the values -- realigns royalties with the usage, and it is a per-play royalty that would be paid that is the greater of 15 cents per hundred streams, which has been called 0015, or the per user fee times the number of users over plays.

All of these are data points that are actually currently being tracked and used by the

Services. They all know the number of plays because they currently pay on number of plays. They know the number of users. For one thing, they charge their users. And they also have per user minima in the current regs. So all of these are currently tracked data points that make for a very simple calculation that, more importantly, captures the values at issue.

And as noted in web casting II -- and I want to note, I really want to keep references to policy objectives to a minimum because I know Your Honors know your own policy determinations, but I also want to make a point that in this proceeding, and this may come as a surprise as well, this is going to be perhaps different from other proceedings.

You are not going to see very much empirical evidence from the Services in this proceeding. You are going to hear an awful lot of policy argument, arguments about flexibility, arguments about incentives, arguments from vague economic principles that attempts to support a roll forward of rates. But you are not going to get a lot of empirical evidence, data being crunched to come up with numbers, because they are not coming up

with numbers. They are asking you to take the same rates and just push them forward without an explanation.

So there will be a lot of discussion over the next four or five weeks of these principles. And I know -- while I know you know them, I do want to make some reference to them here. And this is from web casting II, which notes -- I just jumped ahead by accident -- "the more the rights being licensed are used, the more payments should increase in direct proportion to usage."

We have seen this as a touchstone of CRB teaching that while direct deals may be structured in a variety of ways and settlements may be structured in a variety of ways, when you are making a single rate for the entire country for five years, you need to tie that payment to usage so that when more is being used, more is being paid.

That's a simple fair way to do it. And that is how the Copyright Owners' proposal works. Again, web casting II notes revenue merely serves as a proxy for what we really should be valuing, which is performances, and that a performance metric is directly tied to the nature of the right being licensed.

Now, one thing I will note here, obviously web casting II is non-interactive services. And this is correct, non-interactive services, the value you really are looking at is the performance. And that -- and so a per play, a per performance metric is appropriate for that.

There is an additional value in an interactive stream. We know there is a difference between non-interactive and interactive. The difference is access. It is the on-demand part of it that really makes a difference. Access to repertoires is a critical value for the interactive streaming services, and they know this.

I think iHeartMedia's plan is the all-access plan. Spotify has got a new bundle out that they market as all access. We all know that access and on-demand is a critical value in what separates this and how they market themselves. That's a value and a usage that needs to be reflected in the rates.

Providing on-demand streams with the same rate as non-on-demand streams is missing something because there is an additional value component there. So the non-interactive statutory stays as per play royalty only. I have redacted that so we

can keep the room public for a little bit, and I will go back to it in a few minutes.

Statutory rates here, though, also have per-user charges. There's a recognition that there is an access charge that needs to be levied in these situations. And then, of course, plays, that's the accepted and undisputed measure of usage. The Services' experts know this. There is allocations on a per-play basis.

And so we believe these two values need to be reflected in the rates, and that's why you have the two-prong rate. You are valuing access and you are valuing plays. And you are tying it to usage the way the CRB precedent indicates.

Now, I mentioned that you are going to hear a lot of these more abstract arguments about incentives and flexibilities. Some of these have already been made already, and already been rejected. And this argument, which was something made in Phono I, you are going to hear this very same argument from the Services in this case.

It is this idea that, hey, if you give us a revenue rate, then it gives are more flexibility; you know, we can charge less and we pay less. It let's us do different things.

And it has already been responded to by the CRB. It raises questions of fairness. It does, precisely because the percentage of revenue isn't a good proxy for measuring what you need to measure, which is the usage or the actual intensity of the usage. And concluding by noting this is an 801(b)(1) factor issue. This is a fairness issue. And not properly measuring that value in connection with the usage is a conflict with the policy objectives that are guiding this proceeding.

Web casting II also, I think, in some ways sums up all of these issues around the policy objectives very well. After a long litany of the problems with revenue-based metrics, and there are so many of them, the transparency issues, the issues with defining and allocating revenues, there is so many problems, they really just end by going, but, wait a second, why are we even considering these things when we can actually just measure usage?

Maybe back in the day or when you have satellite radio, you can't measure usage, so you have to use a proxy metric. And that's when you get into these discussions of: Well, what are the pros and cons of a revenue metric and how could it work? But when you can actually measure the usage

directly, why would you even be considering using a proxy? And that was the conclusion in web casting II.

JUDGE STRICKLER: Quick question, counsel. The slide you have up now from Webcasting II, you quote from them, the judges on the panel, and they talk about the intrinsic value of the licensed property.

Will you have a witness who testifies as to the intrinsic value of the licensed property in this case?

MR. SEMEL: I think that the -- I think that we will be looking to get into the intrinsic value through two -- and I am going to discuss this a little bit later. I think there is benchmark approaches that are used to try to get at what the fair value is and there will also be Shapley analyses that get at fair division. But I really think the benchmark analysis is probably the best way of getting at the intrinsic value of the work.

JUDGE STRICKLER: So you will have witnesses who testify that the benchmark values that you purport are appropriate, constitute intrinsic value?

MR. SEMEL: I hesitate to put words in

their mouth as to whether they would use the word "intrinsic" value. So I don't know that I could answer that right away, but I do know that there will be testimony regarding the appropriate value for per play and per user rates based on market outcomes, which, I think, from an economics perspective would probably be considered the best metric of intrinsic value.

I hesitate to put in the economists' words mouth whether they would use the word "intrinsic" to mirror fair market value. I think a lot of economists probably would do that. But I would hesitate to put that word in their mouth.

JUDGE STRICKLER: I wasn't asking you to put words in their mouth. I wanted your recollection of what the witnesses, in fact, were going to tell us, if you recalled it. I know there was a lot of testimony, so maybe you can't answer right now.

MR. SEMEL: I will say I don't believe that the word "intrinsic" is actually used by an economist in connection with their interpretation of fair market outcomes, but I could be wrong.

JUDGE STRICKLER: We will just listen carefully and find out.

MR. SEMEL: I appreciate that, yes, thank you.

Okay. And now here we go, we have a restricted portion beginning.

JUDGE BARNETT: Once again, anyone in the courtroom who has not signed a nondisclosure agreement will have to leave now, please.

(Whereupon, the trial proceeded in confidential session.)

O P E N S E S S I O N

A F T E R N O O N S E S S I O N

(1:14 p.m.)

JUDGE BARNETT: Good afternoon. Please be seated.

I believe we have a Google witness first; is that correct? I believe we have a Google witness first; is that correct?

MR. STEINTHAL: Yes, Google is going to call Zahavah Levine.

JUDGE BARNETT: Thank you.

MR. STEINTHAL: We have some logistics issues we wanted to address.

MR. SEMEL: Yes. We thought because we weren't sure what procedure you wanted us to follow, with regard to, for example, objections that may be towards the foundation that the witness may have for certain statements in the report, is that something you would prefer to be raised upfront or cross the witness and then raised afterwards as sort of a motion to strike, if there has been --

JUDGE BARNETT: Let's do it the latter way.

MR. SEMEL: So in advance, we won't raise questions as to things in the reports?

JUDGE BARNETT: You can just raise them on cross-examination, and then we can go from there.

MR. SCIBILIA: Your Honor, I have the same question regarding exhibits. If the witness is, the direct witness examination includes exhibits that we believe there is no foundation for the witness to testify about, should we treat that the same way?

JUDGE BARNETT: No, you can raise those exhibit objections as the exhibits are handed to the witness.

MR. SCIBILIA: Thank you very much.

JUDGE BARNETT: Raise your right hand.

Whereupon--

ZAHAVAH LEVINE,

having been first duly sworn, was examined and testified as follows:

JUDGE BARNETT: I ask each witness to begin by stating your name, spelling your first and last names.

THE WITNESS: Hi. My name is Zahavah Levine. My first name is Z-a-h-a-v-a-h, and last name is L-e-v-i-n-e.

JUDGE BARNETT: Thank you.

MR. STEINTHAL: I am going to pass to the

witness her written direct testimony and written rebuttal testimony. Even though Your Honors made the ruling about dual witnesses coming back, we're doing a video.

During the break the Copyright Owners have agreed that there is no need for Ms. Levine to come back, so we will have the examination cover the subject matters of both her written direct testimony and written rebuttal testimony, if it is okay with the panel.

JUDGE BARNETT: Certainly. And are you going to ask that these be admitted into evidence, these reports, these written testimony?

MR. STEINTHAL: Yes.

JUDGE BARNETT: Then you need to be using the clerk's original, not a copy.

JUDGE BARNETT: Okay.

MR. STEINTHAL: Thank you.

JUDGE FEDER: It will be helpful if you signal to us in some way when your move from your direct into your questioning on rebuttal.

MR. STEINTHAL: There is subject matter overlap. So what I will do is refer to the -- if I am going to a subject matter that spans both, I will try to indicate to the panel the areas of the

written direct and rebuttal that are covered in that subject matter.

JUDGE FEDER: Thank you.

DIRECT EXAMINATION

BY MR. STEINTHAL:

Q. Good afternoon, Ms. Levine.

A. Good afternoon.

Q. Can you please take a look at the two binders in front of you. One is your written direct testimony and one is your written rebuttal statement and just identify them and identify if it is your signature, that is your signature on each document?

A. Yes, it is my signature.

Q. And when you signed --

JUDGE BARNETT: Excuse me. Just to clear up the record, let's put in the record which exhibit numbers are which?

BY MR. STEINTHAL:

Q. Okay. When you are looking at your written direct testimony, is there an exhibit number on the front?

A. Yes, it is Exhibit 692.

Q. Okay. And with respect to your written rebuttal statement, what is that Exhibit Number?

A. Exhibit 697.

Q. Thank you.

JUDGE BARNETT: Thank you.

BY MR. STEINTHAL:

Q. And when you signed those two exhibits, did you believe that the statements made in your written direct statement and written rebuttal statement were true and correct to the best of your knowledge?

A. Yes.

Q. Okay.

JUDGE BARNETT: Are you offering those at this time?

MR. STEINTHAL: I offer them into evidence.

JUDGE BARNETT: Any objection?

MR. SCIBILIA: I have no objection to the offering of the exhibits. I may have objections to certain of the testimony based on foundation.

JUDGE BARNETT: Thank you. Exhibit 692 and 697 are admitted.

(Google Exhibit Numbers 692 and 697 were marked and received into evidence.)

BY MR. STEINTHAL:

Q. Ms. Levine, could you just briefly tell us a little bit about your background and how you

came to Google?

A. How I got to Google? I got to Google through the acquisition of YouTube. I worked in digital music for about 15 or 16 years until quite recently, like very, very recently.

I, after law school and clerking, I went to a law firm where I was representing startups. After I worked at startups, I found a startup that I love and had a lot of passion for, which is called listen.com, which created the first digital music subscription service in the United States that was not owned by the record companies.

So we launched the Rhapsody music service the same week as the major record companies' services that they invested in Press Play and MusicNet launched. And they all launched in 2001, 2001.

I worked at -- I think my career kind of had three stages. There was listen.com, where it was -- the Rhapsody music service where it was first listen.com and then RealNetworks bought listen.com. That whole period of where I worked in charge of the music licensing for Rhapsody, as well as RealNetworks, was about a five-year period from 2001 to 2006.

And then I went to YouTube. I was general counsel and vice president of business affairs for YouTube. I was also involved heavily in music licensing issues, but also other things. And then in about 2010 I moved from -- well, while I was at YouTube, Google bought YouTube. So I stayed at YouTube for five years, but part of it for about a year before it was bought and then about four years after it was bought.

And then within Google, I moved business units at around 2010 to the Android business unit, where I was hired and I moved out of the legal group. I was responsible for business development for coming up with a licensing strategy and hiring a licensing team for what we had planned to be a Google music service.

And then for the preceding five years, we licensed that service, launched that service, expanded that service to 62 different countries.

Q. Before I go back and ask you a little bit about the earlier part of your career, can you tell us what your involvement has been with Google Play Music and its development?

A. So from Google Play Music, I was there from the very, very beginning before its launch, was

one of just a couple of people brought in super early to help imagine what that product would be and then figure out how to license it.

And I then proceeded to hire a licensing team and -- and was responsible for all of the licensing of Google Play Music and the partners, the music partnerships. And so that included -- we started off by launching a music locker where users could store their personal music collections in the cloud and access them from any device. And we also had a digital music store, where you could buy music and then add it to your locker.

And then we launched a couple of -- in 2013, we launched a Google Play Music subscription service, which is an on-demand all-you-can-eat subscription service for unlimited interactive streaming and tethered downloads.

And then we, a little bit later, we launched a free tier, a 114-compliant non-interactive radio service that we used to upsell people on to the subscription service.

Q. Now, I believe in answering my first question you mentioned going to listen.com and ultimately being part of the original Rhapsody service.

Can you tell us what was the digital streaming business like when you first began in that industry in early 2000s?

A. It was very nascent at that time. It was very challenging at that time. But we -- it was challenging for a number of reasons. It was -- it was a challenge to get users to pay for music on-line when that was right at the same time that Napster was at its peak.

It was a challenge to get record company support for what we wanted to do, partially because they feared the Internet and partially because they feared cannibalization of their lucrative CD business, and partially because they wanted -- they wanted to be in the same business of digital distribution that we wanted to be in, so there were efforts -- you know, there was reluctance to license a competitor, essentially.

But the biggest business or the biggest licensing, my job was in legal at listen.com, and I was responsible for licensing and policy. And the biggest hurdle by far we had in that arena was in the realm of publishing. And that's because when these services launched, there was absolutely no model in place already for how to license streaming

-- really streaming, particularly interactive streaming.

So because we were the first on-demand streaming services, these are the kinds of questions that emerged. Before interactive streaming, all music dissemination either required a public -- on the publishing side, I am talking about, either required a public performance license like radio or live performances or required a mechanical license, like the sale of records or CDs.

But there hadn't been dissemination of music that required both licenses. And our early position was this was -- at least for streaming, for interactive stream is more like a transmit -- like a radio transmission and really should be subject to public performance licenses but not also mechanical licenses.

The publishing community took a different position that, in addition to public performance, it would also require mechanical -- it would also require reproduction license.

If you accepted that it required both, this was the first time ever that you would need to kind of have two different publishing licenses that were obtained from different sources traditionally,

right, for the same use of the work in our business, the same use of the same songs.

But there was this additional question that if it did require a reproduction license, was that even a compulsory license covered by 115 or was there a possibility, the worst case scenario would be an outcome where it was found to be a reproduction license that didn't fall under 115 that would then require individual licensing of, you know, at that time it was like 20 million tracks. Now we all have 40 million tracks.

But the number of publishers -- and there was no publicly available database showing which compositions were in -- you know, were embodied in which sound recordings and often there were multiple publishing interests in a composition and so that would have been the worst case scenario.

But, anyway, there was a lot of time and energy spent in those early days trying to determine -- trying to get legislative clarity and Copyright Office clarity on what licenses do we need and where do we need to go to get them?

We called it in the early days the double dip problem of this assertion that we needed to go to -- like the problem is if you have to go to the

public performance organizations and also get mechanicals. Your negotiation wasn't -- you couldn't negotiate what was the total value of the use of musical compositions in the service. You kind of had two different negotiations.

So that was -- in order to resolve that problem, early on in 2001, and I think it was very helpful that the music companies themselves wanted to be in this business because the music companies, obviously, have some special relationships with the music publishers, so the music companies and the music publishers entered into an agreement --

JUDGE FEDER: Excuse me. By the music companies, do you mean the record companies?

THE WITNESS: Yes, sorry.

JUDGE FEDER: Let's make that clear for the record.

THE WITNESS: Okay. Thank you. I should be -- music recording -- record companies, I will be more clear.

They entered into a kind of foundational agreement to resolve some of the outstanding issues, not all. But in order to -- until we knew what -- how to be licensed, right, it was very dangerous to launch a service and not know if you were going to

be able to subject to compulsory -- like to not know how you were going to be licensed. Obviously statutory damages in this country are scary.

So in order -- you couldn't do it. So in order to enable the launch of Press Play and MusicNet, which were the first subscription services that the music industry had invested in themselves, so it was like Sony and Universal owned Press Play, and EMI, Warner, and was it BMG back then owned MusicNet in partnership also with RealNetworks.

So the record companies and NMPA through their mechanical rights agent HFA entered into an agreement which essentially said -- it had like tradeoffs. It was -- it said the parties agree that there is -- there is no mechanical royalty required for a non-interactive stream, so an Internet radio, like 114-compliant radio.

The parties also agree that there is a mechanical implicated in interactive streaming.

JUDGE STRICKLER: Question for you. Just so I understand, when you say the parties agree, I just want to make sure I understand who the parties are on each side of the ledger here.

Are you saying that the record companies were on one side and the other side were the

Services, Press Play and MusicNet who themselves were by and large owned by the record companies?

THE WITNESS: On the other side -- we refer to it in the industry as the like HFA, RIAA agreement. So I think it was actually the recording industry. I don't remember exactly who the parties were, but it was the record companies -- I think it was the record companies and the music industry. I don't think that the parties to that agreement were Press Play and MusicNet.

But this is why they were entering that agreement. The reason they needed to solve that problem was so that Press Play and MusicNet could launch.

JUDGE STRICKLER: When you say music industry, you also said it was also RIAA and HFA, which is Harry Fox?

THE WITNESS: Yes.

JUDGE STRICKLER: That's who you think the other parties were?

THE WITNESS: It was HFA and NMPA on one side, and the record companies and RIAA on the other side.

JUDGE STRICKLER: Okay.

THE WITNESS: I don't know exactly who

signed it, but that was -- those were the parties. And they struck a bargain that was a very practical bargain that enabled -- it eliminated the risk for launching because it said -- it said yes, here is what everyone got out of it.

The NMPA and publishing community got a concession that a interactive streaming requires a mechanical. So now for the first time in history, you have interactive streaming that requires both performance and mechanical licensing. That was a big win for the publishing community.

And what the record companies got out of it was certainty -- was a license, because it said, first of all, that mechanical license will cover -- it will be -- it will be a compulsory license under 115, so that's very helpful because now the industry knows, you know, nobody can say no to the music service like you will have the ability to launch a service with 20 million tracks.

It will be covered by the compulsory license. What wasn't -- and the other thing that the -- well, the other kind of win for the music industry, which also was very important to the music service, what ended up happening was this agreement was then copied by listen.com, so we then signed the

same agreement with HFA to let us get into business.

And some of the other music services also did the same thing. So that's why I am talking about the foundation of it so much.

But the other thing that the music services got out of it was a concession from the publishing community that non-interactive streaming did not require a mechanical. So radio services like 114 services, which many of us also had, we had a -- listen.com also had a radio service at that time, could just get public performance licenses and be licensed.

But what the big open question that was not resolved with these licenses was what is the rate to be paid? So it said: We're going to give you a license, we're going to tell you that it is compulsory, so you don't have to worry about that, but we're going to agree to agree on a rate in the future.

And if we can't agree to a rate, eventually we will have a CRB, the Copyright Royalty Board will resolve it.

BY MR. STEINTHAL:

Q. And did -- I'm sorry. I was going to say just to refer the Judges, in your initial written

direct statement in paragraphs 25 through paragraph 35, you talk about phonorecords proceedings, which you called rule-making proceedings.

Is this the subject matter that you are testifying to now, is that the same set of proceedings and separate from the rate-making proceedings?

MR. SCIBILIA: Objection, Your Honor, that's not what the testimony says and it is actually factually inaccurate.

MR. STEINTHAL: Well --

BY MR. STEINTHAL:

Q. Were you addressing in that section of your written statement some of the issues that you have been addressing now? I am just trying to give the panel an anchor.

A. Yes, but this was a little bit later. I mean here is the way I would put it.

Q. Okay.

A. That -- that agreement, that HF -- that initial HFA/RIAA agreement was in 2001, late 2001. Listen.com was shortly thereafter. I don't remember if it was late 2001 or early 2002, but it was very shortly thereafter because all the services launched in the same week.

The phonorecords I proceeding, which was the first Copyright Royalty Board, wasn't until 2008. So there was a period of six years, six and a half years where these services were operating without knowing how much they had to pay publishers for interactive streaming.

During that time there was enormous amount of activity around this issue, voluntary discussions. Before the CRB I launched, there were many, many discussions about what the rate should be. Some of them were ordered -- there was all kinds of policy proposals about how to fix the legislation.

There was copyright rulemakings. There were IP subcommittee hearings. The IP subcommittee ordered the Copyright Office to call all the parties in and see if we could settle. The rate -- I mean, there were all kinds of discussions that went on, many of which I was a part of, during this period before Phonorecords I started.

Q. Okay. Now, let's separate ourselves from the legal issues. Now my question is going to be what happened in the marketplace in terms of, you mentioned MusicNet and Press Play at the beginning and Listen.

Did other companies come into the marketplace of digital music services in the 2000s?

A. Yes, many other digital subscription services emerged. There were the three that we talked about. Two -- two of those were later sold to other parties.

So Press Play was sold to Roxio, which also bought the brand Napster out of the bankruptcy proceeding and relaunched, you know, Napster, but it was the legitimate licensed version. It was Napster built on Press Play.

Q. "We" meaning RealNetworks or Rhapsody?

A. No. Did I say "we"?

Q. I thought you said "we."

A. Sorry. Roxio launched Press -- Press Play changed their name. Well, Press Play was bought by Roxio and changed the name to Napster. So then Roxio was running Napster.

Eventually sold it to BestBuy, who managed it for a long, long time before it shut -- no, before then they sold it again to Rhapsody. There was other startups. Music -- well, Yahoo had gotten into the music streaming business with LAUNCHcast. And then they launched their own on -demand music streaming service called Yahoo Music.

And then they also, after launching their own on-demand service, they also launched another startup that had launched called Musicmatch that had an on-demand service. So Yahoo invested a lot in music in digital radio and on-demand streaming services.

And AOL invested by buying -- there had been another startup called Full Audio, which was an -- and all of these companies were involved in all of these discussions. And, you know, there was a trade association called DiMA and I sat on the board of DiMA. And all of these startups and technology companies worked together on a lot of this.

So AOL bought Full Audio and launched what they then called -- I actually don't remember what they called it, AOL Music Now or something, AOL Music, AOL Music Now, something like that.

Microsoft maybe a year or two later launched their own on-demand subscription service called Zune. Then there continued to be multiple, multiple startups. There was Rdio in the United States. There was MOG in the United States, that was later bought by Beats, which was later bought by Apple.

MOG went into bankruptcy. And then --

no, sorry, Rdio went into bankruptcy and then the assets were bought by Pandora. There was Aurous.com, which was owned by Omnifone. There was Sony Connect, so Sony Music tried again after Press Play and they had their own called Sony Connect.

And then, of course, you know, there was Spotify, which wasn't in the U.S. as early, that was more European, but they started really taking off. Obviously everybody in the industry was paying very, very close attention because they were growing -- they grew faster than anyone else and had the most success. That was founded in Sweden.

Q. Let me fast forward to 2011. Did Google participate in the negotiations that led to what's known as the Phonorecords II settlement?

A. Yes.

Q. What was Google's interest in participating in the negotiations leading to the Phonorecords II settlement?

A. So that proceeding emerged soon after I started on the Android Division. We were planning to launch a store, a locker, and a subscription service.

And so our participation was -- I mean, I would actually say -- well, our participation was

primarily designed to make sure that our interests were met in -- for our forthcoming music service.

Q. And was one of those forthcoming music services the subscription on-demand service?

A. Yes.

Q. How would you describe the negotiations that occurred between 2011 and 2012 when the Phonorecords II settlement was entered into?

JUDGE STRICKLER: Excuse me, just before you answer that, I have a preliminary question. Were you involved personally in those settlement negotiations?

THE WITNESS: Yes, I was personally involved. I was Google's representative to DiMA, which was involved, and which was leading the negotiations, but in addition to that, I had personal meetings with many people, including Mr. Israelite about that settlement, so, yes, I was very involved.

JUDGE STRICKLER: Thank you.

BY MR. STEINTHAL:

Q. So how would you describe what occurred in the negotiations that led to the Phonorecords II settlement?

A. So I think there is kind of two phases.

There was like the very beginning when the publishers at the beginning sent over proposals that requested an increase in the rate, and we basically on the service side just had a kind of ballistic reaction to that after the long litigation in Phonorecords I. There was just no way of two years -- I mean, this started in 2010, two years after Phonorecords I settled.

There was just no way we were going to open up the rate discussion. We were comfortable, more or less, with the rate structure. And so, you know -- and it was just hard fought.

So I think we made it very clear upfront after those demands that if there was a hope to settle, like it couldn't be around the basic rate structure. It was going to have to be around other things.

And at some point pretty early on, the publishers agreed, and then we really focused on a bunch of other issues, some of which had something to do with rate but not like the core subscription, not the core interactive, you know, subscription rate. We focused on a bunch of other issues that related to all kinds of things.

Q. Were there new service offerings that

were the subject of discussion?

A. Yeah. So like what I cared most about in that was we were getting ready to launch a cloud-based music store, meaning when you buy your music from Google, it gets directly stored in the cloud. And then you can access it from any Internet connected device as opposed to being downloaded to your device.

So one of the things I cared about a lot was making sure that purchased content could be stored in the cloud under the new regs. And another thing I cared about was preview clips for -- in the store, that they were increased from 30 to 90 seconds.

We cared about -- I mean, those are some of the things. I am trying to remember all of the things.

Q. Were there some issues the publishers raised that they wanted addressed?

A. Yes. The things that the publishers wanted addressed -- I mean, there were other, by the way, there were like -- there were other services. There were like new things emerging. So limited services, so services that didn't make all the world's music available, but maybe some subset, like

by genre, for example.

There were other services that wanted that. But what the publishers were focused on was a couple things that I can remember, so TCCI. They wanted integrity.

So as you guys know, I assume, one of the prongs of the royalty is -- of the royalty rate that Services pay, is a percentage of what the Services pay the labels. And the publishers were looking for some, what they called integrity, to make sure that the payments to the publisher -- that as we -- that we included everything and that there was more transparency in terms of what our payments to the labels were.

We called that TCCI, total content cost integrity. And then another issue that the publishers cared a lot about was bundled rates, so they did not like the bundle term in Phonorecords I, so they changed that.

They negotiated and ultimately it was agreed to change that in a way that -- in a manner that was a little bit more favorable to the publishers. I don't know if you want me to get into the details.

Q. In the latter issue, are you talking

about the definition of revenue and how it would be allocated associated with a bundle?

A. Yeah, so in a bundle there was the prior way that it was -- the original formulation from Phonorecords I said that you take all the revenue from the bundle and subtract the stand-alone value of the non-music component, and the rest of the revenue that was left was the revenue that was allocated to music for purposes of royalties.

And what the publishers sought in the Phonorecords II negotiation was a floor to that. So regardless of what the stand-alone value of the non-music component of that bundle was, the value of music could never be less than 40 or 50 percent of the stand-alone value of the music component. And it was 40 or 50 percent, depending on how many subscribers to the overall bundle.

JUDGE STRICKLER: 40 to 50 percent of what?

THE WITNESS: The floor was either 40 or 50 percent.

JUDGE STRICKLER: Of?

THE WITNESS: Of the stand-alone value of music, of the music component of the bundle. So, for example, if you were to bundle -- I think what

was driving this at that time, you know, the common bundles at that time was music services with carrier data plans.

So your AT&T service would come with Rhapsody, for example. And what they would -- what the new terms said was that when you take out the value of the data, what was left to be attributed to music could never fall below 40 percent of the value of Rhapsody on a stand-alone basis or 50 percent.

And whether it was 40 percent or 50 percent depended on how many subscribers to the overall bundle. I can't remember the exact numbers of subscribers, but if there was, you know, a ton of subscribers to the overall bundle, the discount could go -- the minimum that could be attributed to music, the music component of the bundle was 40 percent of the stand-alone value of Rhapsody in this case, or if the -- if there was, you know, lower than X number of subscribers to the overall bundle, the minimum value attributable to music in the bundle was 50 percent of the stand-alone value of Rhapsody in this case.

JUDGE STRICKLER: Did the publishers explain to you in the negotiations why they were asking for that sort of a 40 to 50 percent minimum?

THE WITNESS: Because the -- in the prior Phonorecords I, there was no minimum at all. So they were exposed to risk, if the stand-alone value -- let's say, for example, a data plan is 50 dollars, and then the bundle of the data plan and music is 51 dollars.

Under the prior construct, you would subtract the value of the non-music component, 50 dollars, and music would only be left with one dollar. And their perception was that that wasn't necessarily fair.

JUDGE STRICKLER: Did they express a concern that the bundling in that manner as you just testified to could be the product of manipulation of revenue?

THE WITNESS: I'm -- I don't remember that specifically. The product of manipulation of revenue?

JUDGE STRICKLER: In other words, purposely inflating the value of the non-music component of the bundle?

THE WITNESS: I see. I mean, I think that there is all kinds of ways that that --

JUDGE STRICKLER: I am not asking you what you think. I appreciate that. I want what you

heard.

THE WITNESS: I don't remember specifically. I just know, you know, and intuitively I understand, like I remember understanding their feeling that that wasn't -- that that original formulation had risk to them.

I can't specifically remember, you know, the allegations of manipulation or something like that.

JUDGE STRICKLER: When you were communicating and negotiating about this issue and negotiating this bundling issue, who was on the other side? Who individually, as you recall, was representing the music publishers?

THE WITNESS: So to be clear, the bundling issue wasn't my most important priority from Google, so I wasn't super focused on that issue. I just remember that that was one of the issues that the publishers cared about.

JUDGE STRICKLER: I am not asking whether you were super focused on it. I am asking whether you were involved in the negotiations or was that someone else?

THE WITNESS: Yeah, all the publishers, coordinated by Mr. Israelite and his lawyer, they

were kind of leading the negotiation. And they communicated with their publishers directly.

JUDGE STRICKLER: Did you negotiate directly with Mr. Israelite with regard to these bundling issues you are testifying to?

THE WITNESS: No.

JUDGE STRICKLER: Did you negotiate with anyone on behalf of -- or who was negotiating for the music publishers on the other side, as it relates to this bundling issue?

THE WITNESS: So I personally would only have been part of internal DiMA discussions on the bundling issue. I didn't personally like -- I had a few -- the things that I really cared about, I probably talked about with Mr. Israelite, but this wasn't the thing that I was personally most focused on from a Google perspective.

So this was not something that I personally, you know, took it upon myself to go outside of the group dynamic. So typically it was -- it was DiMA that was representing all the music services in that.

And so typically we would meet with DiMA and our lawyers that we had hired and discuss it internally and figure out what our proposal was

back, and then DiMA, when the lawyers would send the proposal back, and, you know, but there were some discussions in meetings, but I personally wasn't involved in them.

JUDGE STRICKLER: So you were debriefed then by DiMA as to what went on during the negotiations as it relates to this bundling issue?

THE WITNESS: Yes.

JUDGE STRICKLER: Who was it at DiMA who carried on those negotiations and who debriefed you? Who would that be?

THE WITNESS: It would have been -- so the DiMA leader at the time was Lee Knife. The lawyers were Kenny Steinthal and Bobby Rosenbloom -- was it bloom or thal? I forgot.

MR. STEINTHAL: Rosenbloom.

THE WITNESS: Rosenbloom. So they were the ones that were kind of reporting, you know, it would be the three of them would kind of report back on the discussions on a regular basis.

And then we would -- we were a trade association. So we were doing this as a group.

JUDGE STRICKLER: Thank you.

MR. SCIBILIA: I would like to lodge a couple of objections and the entire line of

testimony. First of all, it is nowhere to be found in her written direct statement and, second of all, it lacks foundation and personal knowledge.

JUDGE BARNETT: You are objecting to Judge Strickler's question?

MR. SCIBILIA: No, no, I am objecting to Mr. Steinthal's question and the testimony that gave rise to Judge Strickler's question. And it is way beyond the scope of what she testified to in her written direct testimony.

JUDGE BARNETT: It has been a while. I don't remember what Mr. Steinthal's question was. I think --

MR. STEINTHAL: I think there is ample testimony in both Ms. Levine's written direct testimony and rebuttal testimony on these subjects, in particular in the rebuttal testimony as to the negotiations from 2011 and 2012, but also I can point you to, in her written direct testimony starting at paragraph 37 and running through paragraph 41, there is a discussion of the 2011/2012 negotiations.

And then in her rebuttal testimony in paragraphs 2 through 6, there is a discussion both of the negotiations of the Phonorecords II

proceedings, as well as the development of the marketplace prior to that point.

MR. SCIBILIA: Your Honor, none of those paragraphs contain anything about TCCI, nor do they contain anything about this bundling issue that Ms. Levine testified about at length.

MR. STEINTHAL: To the contrary --

JUDGE BARNETT: The objection is overruled.

MR. STEINTHAL: Thank you.

BY MR. STEINTHAL:

Q. Now, Ms. Levine, the panel has heard much about the Subpart B on-demand streaming limited download services rate structure that had evolved from the Phonorecords II settlement, including the 10 and a half percent of revenue headline rate and the deduction for public performance rights.

Did Google support the structure of the Subpart B settlement in 2012?

A. Yes, but I just -- I think you meant to say that the rate structure evolved from the Phonorecords I settlement.

Q. I am talking about the rate structure that ultimately was agreed upon in the Phonorecords II settlement.

A. Yes.

Q. Okay.

A. Yes, we supported that rate structure. That rate structure makes sense for our business for the reasons that I explained at the -- earlier. It is very important for a business to understand the overall liability that we have to pay -- the overall cost for music publishing.

And what we like about -- you know, there is two things we like about this rate structure, I think. I mean, there is many things that we like about it, but certainly the importance of having -- of knowing that it is 10.5 percent minus what we pay to the public performance agencies, which we had a sense from all of our experience over the years that we knew that that would -- unless we made a decision, which would be in our control, right, to lower the price substantially, which was not our plan, and not what we ended up doing, that that would effectively cap the royalties at 10.5 percent.

So that was -- that structure is very important to us to understand the overall cost and not have part of the costs be litigated in one realm and then part of the cost litigated in a different realm.

And, you know, additionally we like percentage of revenue because it's -- there is a proportion to how much revenue that we get. So it is -- it enables us to grow our business with some predictability of what our cost structure will be.

Q. Ms. Levine, the suggestion that be made by the Copyright Owners, and it was repeated during openings today, that at the time of the 2012 Phonorecords II settlement, the streaming industry was still in its infancy and in an experimental phase.

Do you agree with that?

A. At the time of which settlement?

Q. The 2012 settlement.

A. It is -- you know, having been there since 2001 and seeing the evolution of all of these services, it is hard for me to agree that the music -- that the industry is in its infancy.

I mean, what was -- there were multiple players by all of the major tech companies. All of the major tech companies had services. Most of the major tech companies were there at Phonorecords II because they either had services or were planning services.

And what is without a doubt is that

everybody knew at that time that the future of music was in streaming and that subscription services and streaming was growing, had been growing much faster than any other segment of the music industry for many, many years, and that it represented the future of the industry.

Q. The Copyright Owners have also taken the position that the negotiations happened in a quick time frame. Can you tell us whether that's an accurate statement?

A. We had ongoing negotiations for about a year, so I don't think that's so quick.

Q. And when the Phonorecords II rates and terms were supported by Google, did Google consider the long-term implications of the rate structure?

A. Of course. I mean, that's why we're all there, right? That's why we're all there negotiating because everybody cares about the -- about the precedent that it is and the long-term implications of it.

Q. Now, again, the Copyright Owners have taken the position, as recently as this morning, that Google Play Music drives value to other parts of Google, Inc. like Maps, Search, Gmail, et cetera, and that this claimed value is not captured in the

revenues reported by Google Play Music.

Is that an accurate position?

MR. SCIBILIA: Objection, leading.

JUDGE BARNETT: A bit, but I am going to allow it.

THE WITNESS: It, in my view, it is preposterous to believe that Google Play Music has anything to do with the growth, success, or value of Google Search, Google Maps, or Google Gmail; each of which have over 1 billion active users.

I mean, Google Play Music with its -- I don't want to say the number of subscribers because -- but you guys -- hopefully Your Honors have access to the number of subscribers. And even if every single one of those subscribers somehow suddenly discovered this new search engine called Google because they were a play music subscriber, it still wouldn't have an impact on that business.

But the idea that people would go to our music service and then suddenly discover or use more Google Search or Gmail or Maps is preposterous. I had never heard of that. That's just a link that I am not aware of any evidence to support it. It is not our goal.

I have not seen that connection. There

is not even any integrations that are in any way unique to Google Play Music with any of those things. So I am --

JUDGE FEDER: Does it have an impact on any other Google products or services, Android, for example?

THE WITNESS: So when you say any impact, like in terms of revenue or growth, no.

BY MR. STEINTHAL:

Q. Just a couple more things, Ms. Levine.

Have you given thought to the implications for Google Play Music for a per play metric of the nature proposed by the Copyright Owners in this case adopted as a royalty structure for Subpart B activity?

A. Yes. And I have got two fundamental problems with a per-play structure. One is related to why we like the revenue, a percentage of revenue structure, which is that there is no proportionate relationship between -- in a per-play structure, there is no relationship between the revenue that we take in and the costs that we have to pay out.

And that's dangerous and it is difficult to run a business, if you can't predict the costs. A related issue is that what I have learned from

being in the music subscription business and particularly with Google Play Music is that the most effective way to grow the number of subscribers and, therefore, bring in more money is to increase engagement with the service.

There is a direct correlation between engagement and lifetime value, meaning if you engage more, you are less likely to churn, to leave the service. If you engage more as a trialer, you are more likely to convert and pay for the trial.

So I feel that a royalty structure that discourages usage and engagement is counter to growing subscribers and getting more money, which is then shared with everybody, including the Copyright Owners.

If we had -- our Number 1 thing we can do to grow money in our pool with which we share with the Copyright Owners is increased engagement. And if we had an incentive to decrease it, I think we would see fewer dollars coming in.

MR. SCIBILIA: Your Honors, I am going to object to the last answer as lay opinion testimony.

JUDGE BARNETT: We are not taking Ms. Levine's testimony as that of an economics expert.

BY MR. STEINTHAL:

Q. One more topic, Ms. Levine. Could you go to paragraph 51 of your written direct statement. I don't want to clear the courtroom, so I would like to ask you a couple of questions about these agreements while the panel can look at your written direct testimony without, as I said, clearing the courtroom.

Are you familiar with Google's direct deals with music publishers for the musical works used in the Google Play Music service?

A. Yes, I manage and directed those deals.

Q. And is your testimony about the terms and conditions of those deals set forth in paragraphs 51 through 54 true and accurate?

A. Yes.

Q. And does Google Play Music have deals of the nature that you describe in this section of your testimony with most or all of the -- what is known as the major music publishers and major Indies?

A. Yes, all of the major music publishers and most of the large Indies.

Q. Okay. I was going to move in the exhibits, but I think the exhibits are in, based on -- you had no objections to the exhibits that are in

the binders, correct? So I would like to -- we're working on day one on the logistics here.

I would like to move in the exhibits that are cited in Ms. Levine's testimony and are contained in the binders and the panel has and witness has.

MR. SCIBILIA: I am going to object to offerings of Exhibits 550, 568 and 572 because this witness has -- Mr. Steinthal has not laid a foundation that any of these studies or PowerPoint presentations were presentations that Ms. Levine had any involvement in.

JUDGE BARNETT: You are not objecting to the exhibits to her direct testimony?

MR. SCIBILIA: I am not.

JUDGE BARNETT: Okay then. Let's take care of those first. Google exhibits 371, 380, 390, 496, 540, and 542 are admitted.

(Google Exhibit 371, 380, 390, 496, 540, and 542 were marked and received into evidence.)

JUDGE BARNETT: Mr. Steinthal, would you like to inquire or respond to the objection on the other exhibits?

MR. STEINTHAL: We will defer on the offering of those exhibits for now.

JUDGE BARNETT: Okay.

MR. STEINTHAL: And I will turn over the witness to Copyright Owners counsel.

JUDGE BARNETT: Thank you.

CROSS-EXAMINATION

BY MR. SCIBILIA:

Q. Good afternoon, Ms. Levine.

A. Good afternoon.

Q. I am going to start the examination with some examination regarding public material, so we don't have to clear the courtroom at this time. But I will move relatively quickly into material that is restricted, given that most of Google's documents in this proceeding have been designated restricted, so I want to be deferential to that process.

JUDGE BARNETT: Thank you. Counsel, could you identify yourself for the record, please?

MR. SCIBILIA: I'm sorry, my name is Frank Scibilia and I am an attorney for Pryor Cashman, and I represent the Copyright Owners in this proceeding.

JUDGE BARNETT: Thank you.

BY MR. SCIBILIA:

Q. Good afternoon. So in paragraph 14 of your written direct testimony, you state that many

services have left the market due to "unviable royalty rate structures," correct? And your written direct testimony is Exhibit 692.

A. Sorry, can you tell me what paragraph again?

Q. Sure, it is paragraph 14.

MR. SEMEL: Sorry to interrupt. I believe somebody just put the restricted document up on the screen. Sorry.

JUDGE BARNETT: It disappeared.

THE WITNESS: Yes.

BY MR. SCIBILIA:

Q. And in paragraph 17 of that statement, you identified Rdio, which filed for bankruptcy and Aurous.com as two streaming services that have "gone bankrupt or been absorbed by larger services," correct?

A. Went bankrupt -- unsuccessfully sought out a buyer. I don't know about that Aurous.com but Rdio went bankrupt and Aurous closed.

Q. And Rdio was acquired by Pandora for over 75 million dollars, right?

A. I don't know the exact amount, but yes it was acquired by Pandora; the assets out of bankruptcy.

Q. Right. Okay. And then you state in paragraph 17 that there may be other examples as have been reported from time to time in the digital media. Do you see that?

A. Yes.

Q. And in support of that statement, you cite an article entitled In Memoriam, the Music Services, Brands, and Companies That Left Us in 2015, correct?

A. That's what the footnote says.

Q. Right. And you cite that as support for your statement that many other services have gone out of business, correct?

A. Yes.

Q. And let's show the article which is Google trial Exhibit 699. Let's pull that up. Let's go through some of the services on this list.

The first one is Aurous. Are you familiar with Aurous?

A. No.

Q. And the article itself states that Aurous was sued by the RIAA three days after launch and then was seized by the RIAA, correct?

A. That's what it says, yes.

Q. And the second one is Beats Music. Do

you see that?

A. Yes.

Q. And Beats Music was acquired by Apple, right?

A. Yes.

Q. And so Aurous -- so are you aware how much Apple purchased for Beats Music?

A. Yes.

Q. Do you know what it was?

A. It says here 3 billion dollars.

Q. The investors in Beats Music did pretty well for themselves in their deal, right?

A. Yes.

Q. So the next says BitShuva Radio. That wasn't an on-demand service, right, it was a radio station for Messianic Jewish music?

A. Okay.

Q. And BopFM, that wasn't a streaming service either, right?

A. I don't know.

Q. How about Grooveshark, wasn't that another infringing web site?

A. I don't know if it was deemed to be infringing, but it was -- it is a web site. I can give you many examples of legitimate on-demand

services that have gone out of business.

Q. I am just going through these ones. These are the ones you testified about in your written direct testimony.

A. Okay.

Q. You are not aware that --

A. I just said there is many other examples. And this is -- this is as have been reported, so there have -- this is not the exclusive or complete list. I think I was just saying that it has been reported and we can certainly supplement the record, if that's allowed, with many other on-demand streaming services legal that have gone out of business.

Q. And Grooveshark violated the DMC's repeat infringer policy?

A. I have no idea.

Q. It was sued and it was shut down because it faced $420 million in copyright infringement damages?

A. That's what this article says.

Q. How about Songza, Songza was acquired by Google, right?

A. Yes, it was.

Q. And how much did Google pay to acquire

Songza?

MR. STEINTHAL: I am just going to interpose, since this is the public part of the transcript, if the witness knows the answer, and wishes it to be in the restricted transcript, we're going to need for some people to leave.

THE WITNESS: It is not -- it is not public, but I can tell you later.

BY MR. SCIBILIA:

Q. But it did acquire Songza, right?

A. Yes.

Q. And Soundtracking, that wasn't an interactive service, right?

A. I don't know.

Q. How about WiMP, do you know what WiMP was?

A. No, not exactly.

Q. Wasn't WiMP purchased by Jay Z and he changed the name to Tidal?

A. Possibly, yes.

Q. And didn't Sprint recently invest 200 million dollars in Tidal?

A. Yes.

Q. So Jay Z --

A. I don't know if it was 200 million but a

lot.

Q. So Jay Z and his investors did pretty well for themselves in that deal, right?

A. I mean, that doesn't mean that Tidal --

Q. That wasn't my question.

A. I assume that the -- I don't know what the terms of the deal are.

Q. Okay. And you talk about Rdio but you have never seen Rdio's profit and loss statement, right?

A. Just a public filing for bankruptcy.

Q. Okay. You looked at that?

A. No, but I read repeated reports that it filed for bankruptcy.

Q. Okay. But you never saw its P&L, right?

A. No. I assume from repeated public reports that it filed for bankruptcy that it had a P&L issue.

Q. Okay. You mentioned MOG earlier in your testimony. Wasn't MOG purchased by Beats?

A. Yes, when it was -- for pennies on the dollar as it was -- because it couldn't make it.

Q. How do you know that?

A. Because I talked to MOG personally.

Q. Okay. I object to that answer as

hearsay.

Wasn't MOG --

JUDGE BARNETT: Overruled.

BY MR. SCIBILIA:

Q. Wasn't Beats then purchased by Apple?

A. Yes.

Q. Do you know how much Apple, it was reported Apple purchased Beats for?

A. Yes, you showed me a report earlier.

Q. Okay. In October 2010 you switched divisions at Google from YouTube to Google's Android division, right?

A. Yes.

Q. Okay. And Android is a mobile operating system developed by Google, right?

A. Correct.

Q. And Android's design is primarily for touchscreen mobile devices such as Smartphones and tablets, right?

A. Yes.

Q. And Google has also developed Android TV for televisions and Android Auto for cars, right?

A. Correct.

Q. And as director of content -- and as director of content partnerships at Android, you

were responsible for music licensing strategy for Google's music services developed and launched by the Android and Google Play business units, right?

A. Yes.

Q. And just to be clear, Google Play is not just a music service, right?

A. Correct.

Q. It also -- it is a retail site for mobile apps and digital media, such as eBooks and movies, and TV shows, right?

A. Correct.

Q. And you testified in your written direct testimony that in 2014 you were promoted to vice president of global music partnerships for Google Play Music, right?

A. Correct.

Q. So at this point I think I am going to need to clear the room and move on to the restricted portion of testimony.

JUDGE BARNETT: Okay. Anyone in the courtroom or hearing room who does not have permission under the protective order to hear restricted information, please wait outside.

(Whereupon, the trial proceeded in confidential session.)

O P E N S E S S I O N

JUDGE BARNETT: Go ahead, Mr. Scibilia.

MR. SCIBILIA: Thank you.

BY MR. SCIBILIA:

Q. And live testimony in Phonorecords I was taken January 26 to February 26, 2008, correct?

A. Live testimony?

Q. Yes.

A. I don't know.

Q. Okay. But you know that no one from Google or YouTube testified, right?

A. In the Phonorecords proceeding.

Q. Phonorecords I.

A. In that proceeding, correct.

Q. Okay. And you state in your written direct testimony at paragraph 33 that during the rebuttal phase of Phonorecords I, the NMPA, RIAA and certain on-line music services --

A. Hold on. Okay.

Q. The NMPA, RIAA and certain on-line music services reached a settlement covering the rates and terms of a Section 115 license for the period 2008 to 2012, right?

A. Yes.

Q. And the certain on-line music services

there didn't include Google or YouTube, right?

A. That's -- that's right, but Google and YouTube were part of DiMA. So we were still getting -- we were -- you know, apprised of the general goings on in the proceedings.

Q. Okay. And --

A. And I was the representative from Google to DiMA.

Q. Right. You testified I think earlier when Mr. Steinthal was examining you that you had some involvement with the rate and rate structure that are presently set forth in 37 CFR Subpart B while you were at listen.com, right?

MR. STEINTHAL: I don't think that's a fair characterization of the record.

THE WITNESS: I think what I said is we had been negotiating a possible -- discussing and negotiating possible rate settlements for years before this official Phonorecords proceeding even commenced.

BY MR. SCIBILIA:

Q. Who is "we" in that answer?

A. There was an industry -- the entire industry, the Copyright Office ordered that we all come together at the table. So it was probably

Jacqueline Charlesworth at that time for HFA, but I am not talking about the settlement under Phonorecords. I'm talking about what the rate should be under the HFA agreement that we had all signed where we were operating businesses without a rate.

There were informal -- I mean, I don't know if you call them informal -- outside the formality of Phonorecords I, there were discussions and negotiations about that structure. That's what I was saying.

Q. So you are not testifying that you were involved or personally involved in the negotiations of Phonorecords -- of the Phonorecords I settlement in early 2008, right?

A. I wasn't there during the Phonorecords settlement, but I had been a part of discussions of a rate settlement with the industry that covered many of the same issues.

JUDGE STRICKLER: Question for you. Was Songza involved in those settlement negotiations, do you know?

THE WITNESS: No, I don't think it would be because Songza was a 1 -- first of all, I don't think Songza existed back then.

JUDGE STRICKLER: Okay.

THE WITNESS: Oh, oh, in 2008?

JUDGE STRICKLER: We're talking about Phonorecords I settlement proceedings.

THE WITNESS: Okay. I would be surprised if it existed all the way back then, but also it was a non-interactive service, so it didn't need a mechanical license.

JUDGE STRICKLER: Thank you.

BY MR. SCIBILIA:

Q. So are you aware of what -- so are you aware that DiMA submitted a rate proposal in Phonorecords I?

A. I'm sure I was at the time as a DiMA member.

Q. Do you know what that rate proposal was?

A. No.

Q. Do you know whether the rate proposal submitted by DiMA included a -- included an all-in rate that included a mechanical-only rate -- I'm sorry, strike that.

Do you recall whether the rate submitted by DiMA was an all-in rate that included a mechanical rate with a deduction for performance?

A. No.

Q. Okay. And, in fact, you testified that the issue -- that as late as 2007, the issue of whether there is -- there was a mechanical rate implicated by an interactive stream was still the subject of Copyright Office -- of a Copyright Office public roundtable, as well as a notice of proposed rule-making, right?

A. Yes, it was chaos. There were discussions of rate -- for rights that no one knew if they even existed.

Q. And that was as late as 2007, right?

A. Yeah.

Q. So --

A. Yeah, I think so. It was whenever the copyright -- yeah, the Copyright Office.

Q. Paragraph 31 of your written testimony talks about that, right?

A. Um-hum.

Q. And you are aware that DiMA was taking the position in that proceeding or in that rule-making that there was no mechanical for an interactive streaming, right?

A. Yes.

Q. So let's turn to the rate that was negotiated in 2008 and codified at 385 Subpart B.

Now, you testify in paragraph 35 that based on the then-prevailing retail pricing and label wholesale pricing, we at Google did not expect the minima or floors that were part of that rate to come into play, right?

A. Right.

Q. And you clarified at your deposition that this alleged expectation only held at the $9.99 price point, right?

A. I don't know if I said "only held," but, yes, we -- what we meant, what I meant by that is, yeah, at the 99 -- at $9.99, services were more likely to -- were going to be paying under -- were going to be paying 10.5 percent of revenue under that -- under that formula based on what we knew at the time, which was before all of the PRO withdrawals and all of that subsequent unpredictable events.

Q. Now, I believe you testified that at the time of the 2008 settlement, the Services didn't think that performance royalties were going to go up much, right?

A. Certain -- I don't know, remember if I testified to that, but that's -- yes, that was -- that has been my expectation, general expectation

based on a long experience of PRO rates, they went up incrementally.

They went up substantially, actually, for interactive streaming versus non-interactive streaming. But, yes, over years and years, the percentage of revenue after there was an increase for interactive streaming was generally within a pretty manageable range.

Q. Okay. And you are not aware -- so -- I'm sorry.

Do you know whether or not performance royalties have increased dramatically since the 2008 settlement?

A. Well, I have read in the press a lot of -- about a lot of relatively alarming events which are the events that -- which is part of the reason that we want to drop the floor payment now, which is there have been, with publishers that have withdrawn from ASCAP and BMI, so we always knew before that ASCAP and BMI have a rate court.

So in the event -- there was always some assurance of a reasonable rate with ASCAP and BMI because if there is an unreasonable rate demand, you could go to a rate court.

But once these major publishers started

withdrawing or seeking to withdraw from ASCAP and BMI and strike deals with very, very high percentages 100 percent increase over what had previously been agreed or more, that starts to -- that starts to be very, very concerning because for the first time it is possible that a rate could end up having a whole rate of more than 10.5 percent for publishing. I don't mean a rate. I mean that the publishing liabilities in the aggregate could end up being a lot more than 10.5 percent, if you have a mechanical minimum of 50 cents.

And then publishing skyrockets. So publishing is now 10 percent plus a mechanical minimum equivalent to essentially 5 percent at 50 cents, right, of a 10 dollar rate, suddenly you are paying 15 percent instead of 10.5 percent. And that is the reason that we have sought to strike the mechanical floor limit.

JUDGE FEDER: What exactly is the purpose of the mechanical floor? What is it protecting against?

THE WITNESS: So in my opinion, the reason there is a mechanical floor is because under the 10.5 percent rate, you are allowed to subtract performance royalties from the total.

If the Services went to the PROs and said: We will just pay you 10.5 percent and there is zero left for mechanicals, the publishing community -- the publishers don't want that outcome. Because the way that the community is structured is when money goes to the PROs, it goes directly to the writers and publishers splits without regard to any advances.

But when money gets paid to the publishers, the publishers can recoup their advances that they have offered the songwriters before having to pay the money that they owed to the songwriter's share.

JUDGE FEDER: Let's not speculate about their motivations.

THE WITNESS: Okay. So I will say it was to ensure that a certain percentage of the revenues go to the mechanical.

JUDGE FEDER: Okay. So the only time that would kick in necessarily is if the publishers were -- strike that.

If the performance royalty goes up?

THE WITNESS: Correct, goes -- yes, exactly.

JUDGE FEDER: So this was, is it fair to

say that this was in there precisely to address a situation where the performance royalty increased, perhaps to or above 10.5 percent?

THE WITNESS: I am going to guess that that's what the publisher is going to tell you, but --

JUDGE FEDER: What other purpose would there be for having a floor?

THE WITNESS: Just to ensure that a certain percentage of the total publishing royalty was allocated to mechanicals versus publishers.

JUDGE FEDER: Mathematically is there any way it can kick in, unless that publisher were -- the performance royalty goes up?

THE WITNESS: Yes, it can. Because the performance royalty doesn't -- well, the way that it kicks in is not if the -- is if the Services agree with the PROs. So they were doing voluntary agreements, okay, a lot because there were rate courts but that was only a back stop.

You would go to the PRO and do a voluntary agreement. So let's say like the general range was 4 to 5 percent for an on-demand service. The reason that I believe that floor was there is so that we didn't go to the PROs and say hey, we will

give you 7 percent for performance and that will only leave 3 and a half percent or whatever, you know, 30 cents to go to the mechanicals. Because the publishers wanted to make sure that about half of the total publishing royalty funneled through the mechanical system so that they can recoup the advances that they paid out. That's my belief.

JUDGE FEDER: We're sort of getting away from my question, which is what you just described is a situation where the performance royalty increases from 4 or 5 percent to 7 percent. In that case it was through a deal negotiated between the services and the PROs.

But for whatever reason, for whatever motivation, the mechanical floor can't come into play unless that performance royalty increases by a certain amount; is that correct?

THE WITNESS: Yes.

JUDGE FEDER: That was my question. So if, if the floor is there to guard against precisely that outcome, I'm having difficulty understanding how it is that that is not an outcome that you considered a possibility.

Why else was it there?

THE WITNESS: Because my understanding

was it was there to prevent the Services from volunteering 7 percent or 8 percent or 10 and a half percent to the PROs and just be done with it.

They -- they wanted to prevent voluntary agreements that were at a higher rate because from the service perspective, if it was capped at 10 and a half percent, we could just say: Here, PRO, here is a check for 10 and a half percent and we will -- we don't have to deal with administering the whole mechanical licensing, which is a huge hassle.

Because it would be zero. So this was the way the publishers ensuring that we didn't voluntarily agree to higher with the PROs so that about half of the overall publishing royalty went directly to the publishers.

JUDGE FEDER: Okay. Go ahead, counsel.

BY MR. SCIBILIA:

Q. Okay. A couple things. First, my question was a yes-or-no question, which was are you aware of whether the performance royalties have increased since the Phonorecords I settlement in 2008?

MR. STEINTHAL: Can I just ask whether we're talking about non-interactive services, interactive services, generally? There has got to

be some context for this.

JUDGE BARNETT: Excuse me, Mr. Steinthal. And if you are going to interject and make an objection, let's state these as objections. Otherwise --

MR. STEINTHAL: Objection.

JUDGE BARNETT: -- this is not a dialogue. Go ahead.

MR. SCIBILIA: I was referring to interactive streaming royalties, which are the subject of this proceeding.

THE WITNESS: Was I aware that they went up?

BY MR. SCIBILIA:

Q. Are you aware of whether the performance royalties have increased since the 2008 Phonorecords I settlement?

A. I'm aware that there is a major initiative to try to increase them by -- in the publishing community.

Q. Okay. But are you aware of have they gone up?

A. So some have; and some haven't.

Q. Which ones have gone up?

A. For the publishers that have withdrawn,

so GMR and purportedly, they are asking for higher -- they are asking for -- or maybe GMR didn't withdraw because they were never part of it, but the ones that are not new ones that are emerging and withdrawn ones, like Sony ATV from what I read, and I read some court papers that were made public, they were asking for higher performance royalties, substantially higher performance royalties.

And I know from my discussions with, you know, I know that the publishers in Sony ATV's case, for example, the goal of withdrawing was to get higher rates.

Q. Okay. Well, you --

A. Was to get outside the ambit of the rate court, so that they weren't bound by those -- those limitations.

Q. Now, do you recall when you testified at your deposition about this hypothesis you had about why the publishers may have wanted a 50 cent mechanical-only floor, and you sort of talked about what you just talked about now about your theory that they may have wanted to discourage services from going to the PROs and getting licenses, you admitted that you never -- that you never spoke to a publisher about that?

A. I didn't say discouraged them from the going to the PROs and getting licenses. I said discourage them from paying the PROs more than the standard PRO rates at the detriment of the publishers.

Q. Right. But that was just a hypothesis of yours. It wasn't based on anything you heard from any publisher --

A. That was something that I remember from -- I mean, I don't remember how or why, but it is -- I know how the music industry is structured in terms of how the money flows through the PROs and how the money flows from the publishers. That's not something I hypothesize. That's something that I know.

And I remember, like looking at that formula and like understanding that that was the reason, so I don't know exactly -- I do not remember now how I got that information. It is clear -- to me it is still pretty clearly a rational conclusion based on the structure of the industry. I would want that, if I was a music publisher.

Q. Right. Again, it is not based on anything you heard from any music publisher, nobody told you that, that that was their reason for

wanting --

A. I am not saying nobody told me that. I can't remember specifically who told me that. I am going to guess at some point someone probably did tell me that because I don't think I would have thought of it on my own, but I don't remember who or when. I will be honest about that.

Q. And when did this hypothetical person tell you this?

MR. STEINTHAL: Objection.

THE WITNESS: Did I just say --

JUDGE BARNETT: Sustained.

THE WITNESS: -- I don't remember who or when exactly.

BY MR. SCIBILIA:

Q. Well, let's talk about your knowledge of the music industry and why you believe that this was a possibility, that what the publishers wanted in a negotiation where you admitted you weren't present, okay?

A. No, I was actually part of negotiations for rate settlement before the Phonorecords formally started, but yeah.

JUDGE STRICKLER: Phonorecords I?

THE WITNESS: Yes, Phonorecords I.

BY MR. SCIBILIA:

Q. We have established you weren't there at the end when the settlement was adopted or was made, right?

A. Correct.

Q. Was reached?

A. Correct.

Q. So you are aware then because you are very knowledgeable about the music industry that when a publisher makes a direct deal for performance rights with somebody such as Google, right, Google pays the performance royalties to the publisher and then the publisher pays -- sends that money to the PROs so the PROs may then pay the songwriters their share, right?

A. I'm actually not aware of exactly how that money flows, but I believe that.

Q. Okay.

A. I am not surprised by that.

Q. And it is treated the same way as moneys would be treated if Google had gotten the license directly from the PRO, right?

A. Well, the publisher in that case, though, has the ability to allocate how those moneys are allocated between mechanical and performance.

Presumably they have some say in that because it is flowing through them, instead of we just paid the money to the performance.

Q. But you have no basis for testifying that the publishers do not do what I just said, which is send all of the money to the PROs to then divide between the songwriters and the publishers, right?

A. Oh, 100 percent of the -- 100 percent of the revenue that we send to the publishers? You are saying, goes -- the publishers send 100 percent of that to the PROs?

Q. I am saying that.

A. That would surprise me.

Q. Okay. So you don't know that, correct?

A. I don't know that.

Q. Okay. Now, in terms of the 2012 settlement, you state at paragraph 38 of your testimony that issues other than rate dominated those settlement negotiations, correct?

A. Yes.

Q. And let's turn to your rebuttal statement now, which is Google Trial Exhibit 697. Now, in paragraphs 3 and 4 of your rebuttal statement, you state that Mr. Israelite's discussion of the Phonorecords II settlement "glosses over certain

very substantive discussions, including discussions regarding the addition of Subpart C, which provided rates and rate structures for limited offerings, mixed service bundles, music bundles, paid locker services and purchased content locker services, correct?

A. I mean, it says what it says.

Q. Okay. Do you agree with that statement?

A. I agree with what it says in paragraph 3.

Q. Okay. Does Google offer any limited offerings as it is defined in Subpart C?

A. Hold on -- "which provided rates and rate structures for limited offerings, mixed service bundles, music bundles, paid lockers, and purchased content locker services." Yes.

Q. The answer was Google does offer limited offerings?

A. I think when we purchase content locker services, we offer.

Q. No --

A. Just limited offers?

Q. Yes.

A. No.

Q. How about mixed service bundles, do you offer those?

A. I don't think we have ever used that rate in that, no.

Q. Okay. How about music bundles, have you ever used the rate for music bundles?

A. I don't think so, but it is possible in some very limited instance we may have.

Q. Okay. What about paid locker services, does Google offer a paid locker service?

A. No.

Q. Now, you state in paragraph 5 of your rebuttal testimony that the market for streaming music was already well past the experimental phase by the Phonorecords II settlement in 2012, correct?

A. In 2012, um-hum.

Q. Right. And when you refer to the market for streaming music in that sentence, are you referring to just interactive streaming or are you also including non-interactive streaming?

A. I am not sure that I had that question in my mind. I mean, I think both were pretty -- but since this proceeding is about 115, we can call it interactive, if you want.

Q. No, I just asked you what you are referring to in your earlier sentence?

A. I think both were developed by 2012.

Q. Okay.

JUDGE STRICKLER: I have another question about, if I may, counsel, about that sentence.

You said that the market for streaming music was already well past the "experimental" stage.

THE WITNESS: Yes.

JUDGE STRICKLER: What did you mean by "experimental"? I know that you are making a rebuttal to Ms. Israelite's use of the phrase that you quoted "experimental ventures" in that same paragraph 5, but what did you understand "experimental" to mean as you used it in the rebuttal?

THE WITNESS: What I mean here is that by the time of Phonorecords II, you had major companies at the table who were -- either had or were planning to make significant investments in streaming music.

This was -- this was after we already had, you know, we have already run through, there has been so many startups, come and gone, acquired, you know, a lot of these companies had been part of different experiments. Some of them were downloads. Some of them were -- had been other streaming services.

But at this point the people at the table there know that digital music is the future, that streaming is the future. It had already -- while it may be the case that streaming music was not on that date a massive portion of the market at that time, I think it was clear to everyone there that it would be in the future, that the writing was on the wall, there was no going back.

And so I guess my point is that like the people there were serious. They were serious. They cared about the structure. It wasn't like, oh, this is a little, you know, experimental thing, in my view, at least from Google's perspective, it was not something that was like this is a tiny little experiment that isn't meaningful, like we cared in Phonorecords II what that settlement was.

JUDGE STRICKLER: So was the experiment the rate and rate structure or was the experiment that was now past the idea that there would be a streaming industry that was in some sense permanent, an interactive streaming industry that was permanent?

THE WITNESS: I mean, I -- can you ask that question again?

JUDGE STRICKLER: Let me try it again.

You refer to the experimental stage that was past. So there was a time when there was an experimental stage.

Was that experimental stage, I am trying to understand your testimony from before, was that experimental stage the stage in which maybe interactive streaming will be a commercial success, maybe it won't, or was it what was experimental was the rate and rate structure?

THE WITNESS: The truth is I was just referring to Mr. Israelite's use of the word. And my sense is that his -- he was suggesting that folks didn't really care because there wasn't a lot of money involved, so people didn't really care in the early days.

And what I'm saying is by 2012, the people that were there cared because they understood that the rate structure would have implications into the future in a real way for their businesses.

JUDGE STRICKLER: Thank you.

BY MR. SCIBILIA:

Q. Now, when you made the statement about the streaming market no longer being in its infancy, did you consider any information regarding the number of streams that the existing streaming

services were making during that period or before and after 2012?

A. When I made what statement?

Q. The statement that by 2012 when we settled the Phonorecords II rates, the streaming market was no longer in its infancy.

JUDGE STRICKLER: Where is the infancy?

MR. SCIBILIA: It is on paragraph 6 on page 3 of the sentence right before the end, the third line from the bottom.

JUDGE STRICKLER: Thank you.

THE WITNESS: What I mean by that is there had been enough experience in the market for everyone to see that streaming was growing, that sales were declining, and that streaming was the future.

BY MR. SCIBILIA:

Q. But you didn't consider any revenue information from the streaming services that were in existence at that point or any streaming data from any of the services that were in existence at that point, right?

A. No. When I made that statement -- well, streaming services, yeah, no, I was talking about -- I did -- I think I referred to all kinds of

streaming services that had existed throughout the 2000s, AOL and Yahoo and Microsoft and MOG and Sony Connect and Rdio and Aurous. I talk about a long list of services that show we have enough information at this point to know that this is serious and it is the future.

Q. But what information from those services did you consider? Did you consider their revenues? Did you consider their streaming data? What did you consider in --

A. Just overall trends that music was growing.

Q. Okay. But you didn't look at any streaming data?

A. I know that. Anybody that is in the music industry knows that for the last, you know, many, several years, music streaming has been growing every year.

Q. In your rebuttal statement you testify at paragraph 9, as a rebuttal to statements made by the Copyright Owners that certain of Google's other products benefit from Google's offering of the Google Play Music service that "the value proposition flows in the opposite direction."

A. What section are you looking at?

Q. This is paragraph 9 of your rebuttal statement.

A. Yeah. Let me look at what the prior sentence is. Yes. Yes. I believe this is -- I think this is a key point.

Q. Okay. And let's mark Exhibit 546.

JUDGE STRICKLER: Is that restricted?

MR. SCIBILIA: Yes, this is restricted.

JUDGE STRICKLER: You are going to put it up on the screen?

MR. SCIBILIA: Yes.

THE WITNESS: I don't think I have it.

BY MR. SCIBILIA:

Q. 546?

JUDGE BARNETT: It is in the Google Volume 1. Ladies and gentlemen, we're about to enter another restricted session, so if you are not privy to restricted material, please wait outside.

(Whereupon, the trial proceeded in confidential session.)

O P E N S E S S I O N

JUDGE BARNETT: Okay.

BY MR. SCIBILIA:

Q. I would like to go back to what we were talking about before when you were talking about publisher withdrawals. You are aware, are you not, that no publisher is currently withdrawn from ASCAP or BMI, correct?

A. There are still independent publishers outside of those, but I'm actually not up-to-date on the status of this right now. So as you know, the licensing -- I stopped being in charge of the licensing about a year and three months ago, almost a year and a half ago. So I am not up-to-date on every detail these days as I used to be.

Q. Okay. Are you aware that the rate courts for BMI and ASCAP ruled that partial withdrawals are violative of the consent decree?

A. I don't know that that's a final -- I am not aware that that is a final and complete decision.

Q. Okay. Are you aware that the Second Circuit ruled on that issue?

A. No.

Q. You are a lawyer, right?

A. Yeah, but I am not any longer involved in music licensing.

Q. Okay. So you are not aware that publishers currently have no right to partially withdraw from the PROs, right?

MR. STEINTHAL: Objection.

THE WITNESS: What does partially withdrawn mean?

BY MR. SCIBILIA:

Q. You testified about partial withdrawals. What did you mean?

A. No, I said withdrawals, actually. You are going into a nuance that I just don't remember the details of.

Q. Okay. Are you aware of any publisher that has completely withdrawn from ASCAP or BMI?

A. I am just aware of a -- of a very strong desire and initiative of the publishers to do that. And a lot of activity and lawsuits and deals that people felt pressured to sign and those kinds of things in a world of uncertainty about all of that. Where the status is of that today, I -- I don't know.

Q. Okay. I just would -- I forgot to move in a document, which was Exhibit 568. I would like

to move that in now, if I may.

THE CLERK: It is already in.

MR. STEINTHAL: No objection. I think it is already in.

MR. SCIBILIA: Okay, great. Then, with that, I am done.

THE WITNESS: Wait. We're done?

JUDGE BARNETT: Mr. Steinthal?

MR. STEINTHAL: I just have a very few questions.

JUDGE BARNETT: Okay. I'm sorry, Mr. Steinthal, let me just ask if any of the other Services have questions for Ms. Levine? No?

MS. CENDALI: No.

MR. ELKIN: Not for Amazon, Your Honor.

JUDGE BARNETT: Thank you. You may redirect.

MR. STEINTHAL: Thank you.

REDIRECT EXAMINATION

BY MR. STEINTHAL:

Q. You were asked a number of questions and gave some testimony about publishers withdrawing from the performing rights organizations. And I believe at one point you testified that the basis for your information was that you had read certain

decisions that discussed the whole concept of withdrawals; is that right?

A. I read a bunch of stuff. I remember reading some -- yes, it must have been a decision. It quoted a lot of the publishers that I know and love, and, yeah, there was some pretty crazy dirt in those.

Q. Were those decisions relating to Pandora's rate proceedings with ASCAP and BMI?

A. I think that's what it was.

Q. So were those proceedings about performance rights associated with non-interactive music services rather than interactive music services?

A. Yes.

Q. You gave some testimony and used the phrase "floor" when you were answering some of Judge Strickler's questions. And you were talking about the lesser of the TCC number and the 80 cents per subscriber number.

Do you remember that?

A. Yes, that's a minimum per sub.

Q. When you used the word "floor" in that context, you weren't referring to the mechanical-only floor?

A. Right, the 80 cents. Sorry, whenever it is the lesser of prong, I sometimes get --

Q. I just wanted to be clear that it wasn't the mechanical-only floor you were speaking of?

A. There was a second where I referred -- there was a moment where we did talk about the mechanical-only floor. We never got back to that conversation.

Q. Okay. You were shown a few documents and I just have to -- one of them is Copyright Owner Exhibit 3219, which was the, an agreement which I think it was with CD Baby. And I am afraid I am going to have to ask the public to leave for two minutes. It will be very quick.

JUDGE BARNETT: You know the drill.

(Whereupon, the trial proceeded in confidential session.)

O P E N S E S S I O N

JUDGE BARNETT: Thank you. Could you please stand and raise your right hand.

Whereupon--

ADAM PARNESS,

having been first duly sworn, was examined and testified as follows:

JUDGE BARNETT: Please be seated.

MR. MARKS: Judge Barnett, I apologize. I didn't hear because it didn't pick up on the mic. Has he stated his name for the record or would you like me to start with that?

JUDGE BARNETT: Start with that if you would, please.

DIRECT EXAMINATION

BY MR. MARKS:

Q. Mr. Parness, would you state your name for the record?

A. My name is Adam Harris Parness.

Q. Where do you work?

A. I work at Pandora Media.

Q. What is your job title?

A. My job title is head of publisher licensing and relations.

Q. And what are your job responsibilities?

A. My team manages everything at Pandora involving the musical composition copyright. We own music publishing licensing strategy, which means that we negotiate licensing agreements with music publishers and with performing rights organizations, globally.

We operationalize those agreements, fulfilling all contractual obligations, including reporting and royalty requirements. My team also manages Pandora's day-to-day relationships with music publishers and songwriters and any entity that represents either.

Q. How long have you worked for Pandora?

A. I have worked for Pandora since July of 2016.

Q. Do you have a university degree?

A. Yes, I do.

Q. From where and when?

A. I have a Bachelor of Music obtained from New York University in 2000.

Q. And would you please briefly describe for the judges the jobs you have held since graduating from NYU?

A. Sure. I graduated from NYU in 2000 and began work at the Harry Fox Agency. At the time it

was a subsidiary of the National Music Publishers Association and was and I believe still is the largest United States based licensor of mechanical licensing rights.

I stayed in that position -- I should tell you more about it. I had a hybrid role where I worked on anti-piracy efforts, particularly in the digital sphere and worked on mechanical licensing initiatives, both in digital and the more physical worlds as well.

I left that position in 2002 to focus on running my music production and consulting business full time. I did that for a number of years. One of my clients was a digital Jukebox company by the name of AMI Entertainment Network. I eventually went to work for that company full-time.

In 2006 I joined RealNetworks running the music licensing team, focusing primarily on a business that they wholly-owned named Rhapsody, they had recently acquired from listen.com. Rhapsody at the time was the largest music subscription streaming business.

I ran music licensing strategy and relations both on the record label and music publishing side, stayed in that role through 2013

including the spinout of the Rhapsody business from, as a separate unit from RealNetworks.

In the year 2013 I joined Amazon as principal content acquisition manager, where I owned global music publishing strategy for the company, working across both digital music and digital video, and stayed in that role until 2016 where as mentioned before, July of last year I joined Pandora as head of publisher licensing and relations.

Q. Mr. Parness, over the course of your career, have you had any professional involvement with the Digital Media Association?

A. Yes, I have.

Q. And what does DiMA do?

A. DiMA is a trade organization that represents the collective interests of digital media companies, particularly in the music sphere. They represent and aggregate together those interests working on legislative efforts, on rate-setting proceedings, as well as all sorts of other music licensing issues and matters generally affecting their membership.

Q. And what has your personal involvement in DiMA been?

A. I have been personally involved with DiMA

since 2006. Right now I hold the Pandora Board seat for DiMA. I held that Board seat for a number of months since joining Pandora.

I have also held a Board seat at DiMA on two previous occasions during my tenure at Amazon and during my tenure at Rhapsody, and I have attended numerous meetings over the years, both general, Board-related, and related specifically to music licensing and rate-setting proceedings.

Q. Did you prepare written direct testimony in connection with this proceeding?

A. Yes, I did.

Q. If you could please turn to the first tab of the binder in front of you, and do you see the document marked as Pandora Exhibit 875.

A. Yes, I do.

Q. And do you recognize that document?

A. Yes, I do.

Q. What is it?

A. This is my written direct testimony.

Q. And if you could please turn to the last page. Is that your signature?

A. Yes, it is.

MR. MARKS: I offer Pandora Exhibit 875 into evidence.

MR. SCIBILIA: No objection.

JUDGE BARNETT: 875 is admitted.

(Pandora Exhibit Number 875 was marked and received into evidence.)

BY MR. MARKS:

Q. If you could turn to the second tab of the binder. Do you recognize the document that has been marked as Pandora Exhibit 876?

A. Yes, I do.

Q. Is that the document that was appended to your written direct testimony as an exhibit and referred to in your written direct testimony?

A. Yes, it is.

Q. And what is that document?

A. This is the Department of Justice's closing statement regarding their Antitrust Division's review of the ASCAP and the BMI consent decrees.

Q. And is this document available to the public?

A. Yes, it is.

Q. Where can you find it?

A. You can download it where it is published on the Department of Justice's web site.

MR. MARKS: I offer Pandora Exhibit 876

into evidence.

MR. SCIBILIA: No objection.

JUDGE BARNETT: 876 is admitted.

(Pandora Exhibit Number 876 was marked and received into evidence.)

BY MR. MARKS:

Q. Where were you working when the Copyright Royalty Board commenced the Phonorecords I proceeding?

A. At that time I was working at RealNetworks.

Q. What was your title?

A. My title was director of music licensing.

Q. Were you involved in the Phonorecords I proceeding?

A. Yes, I was.

Q. And in what capacity?

A. I worked internally with my fellow colleagues at RealNetworks, you know, in working with DiMA as well, discussing the Phonorecords I proceeding, particularly in the settlement phase, assessing various offers and counteroffers around the settlement and analyzing them to discuss what rates and terms we would put forward and the viability of rates and terms that we received.

I was also part of the DiMA member working group working with other DiMA members where we would receive updates from DiMA and from our counsel, we were jointly represented in that matter, on the status of the Phonorecords I proceeding and direct involvement as well in the settlement that ultimately resolved that proceeding.

Q. Was RealNetworks one of the services that participated in Phonorecords I?

A. RealNetworks was one of the participants.

Q. And what was the role of DiMA in Phonorecords I?

A. DiMA played a coordinating role amongst all of the member companies, and we were jointly represented.

Q. What do you recall is the key elements of the dispute between music services, on the one hand, and music publishers and songwriters on the other?

A. There were a few key areas of dispute. First and foremost was whether streaming would implicate a mechanical right at all. We believed that it didn't.

There was a dispute over the overall structure of what the rates should be and then, furthermore, dispute over the general level of what

the rates should be beyond the structure itself.

Q. And how was the dispute over whether streaming implicates a mechanical right resolved?

A. That was resolved as part of the settlement amongst the participants, ultimately arriving at an agreement that interactive streaming would implicate a mechanical right and that non-interactive streaming would not implicate a mechanical right.

Q. And what was the dispute over the rate structure?

A. I'm sorry, can you repeat the question?

Q. Sure. What do you recall the dispute was over the rate structure?

A. The digital service providers largely preferred that the rate structure would be structured as a percentage of revenue versus what the Copyright Owners were asking for at the time, which was largely a per play or so-called penny rate.

Q. Do you recall any other disputes over how the rates should be structured, other than the dispute between percentage of revenue and a per-play rate?

A. Yeah. Speaking larger to the structure,

there was a fundamental dispute about what that rate should encompass; namely, the digital services taking the viewpoint that that should be an overarching, all-in publishing rate that would include the impact of both mechanical and public performance royalties or whether that rate should just be a pure mechanical-only rate.

Q. And what was the dispute over rate levels?

A. There was a very big gap between the digital service companies and the Copyright Owners during that proceeding about what the appropriate rate level would be.

JUDGE STRICKLER: Excuse me. Was that dispute, since there was a dispute between the parties as to rate structure, was there a dispute both on whether -- what the percentage would be if it was a percentage structure or what the penny rate would be, if it was a penny rate structure?

THE WITNESS: Yeah, there was a dispute on that as well.

JUDGE STRICKLER: So the dispute was sort of bifurcated, it was a dispute on the penny rate, if there was a penny rate, what it should be, and if there was a percentage rate, what it would be?

THE WITNESS: Well, speaking specifically to the percentage rate, the DiMA member companies initially believed that that rate should be 4.1 percent of revenue, and, again, just for limited downloads, because we didn't think that interactive streaming involved the mechanical right; whereas the publishers believed that it did and they were asking for a much higher rate.

JUDGE STRICKLER: Counsel.

THE WITNESS: Does that answer your question?

JUDGE STRICKLER: Yes, thank you.

THE WITNESS: Thank you.

BY MR. MARKS:

Q. How were the disputes over rate structure and rate levels resolved?

A. Can you repeat the question?

Q. Yeah, I'm sorry. How were the disputes over the rate structure and the rate levels resolved?

A. They were resolved as part of a settlement agreement between the participants that was arrived at during the Phonorecords I records proceeding before the judges had issued a decision.

Q. And what were the key drivers of the

settlement from RealNetworks' perspective?

A. A couple key drivers. One was that we arrived at a rate that was an all-in rate that encompassed both a mechanical and public performance royalties.

A couple other key drivers as well, we got to a headline rate that was a percentage of revenue, albeit with certain minima that potentially could kick in. And in looking at the level of that rate, we believed that it was viable. So this is a 10 and a half percent of revenue rate.

We did a lot of forecasting and analysis around that rate, and we believed that it was viable and sustainable for our business, as well as we got a discount -- not a discount -- but it was a lower rate for prior periods.

And the other key factor as well was that there was an acknowledgment by the publishers that non-interactive streaming would not implicate a mechanical rate.

Q. And is that consistent with your understanding of the music user perspective generally, from your discussion with DiMA and other DiMA members?

A. Yes, it is.

JUDGE STRICKLER: Question along the lines of these drivers that you are testifying to now. Up until the time of the settlement, while you were negotiating, there was a dispute as to whether or not even interactive services should be subject to a mechanical rate. Correct?

THE WITNESS: That's correct.

JUDGE STRICKLER: And eventually it was decided that a mechanical rate would apply?

THE WITNESS: For interactive streaming, yes.

JUDGE STRICKLER: And because -- was there a quid pro quo? Was the rate reduced by the Copyright Owners in negotiation because they were able to get a mechanical rate? Did they say in words or substance if we get a mechanical rate, we will agree to a lower mechanical rate?

THE WITNESS: Part of what informed that was the fact that we got an all-in rate that included -- it was an all-in rate that encompassed mechanical plus public performance. In other words, it was a headline rate of 10 and a half percent of revenue but we were able to deduct out public performance costs from that.

So that was the reason from the Services

point of view about why we were willing to agree to a mechanical rate and interactive streaming because it specifically encompassed an all-in rate where you get a credit for the public performance royalties that you pay.

JUDGE STRICKLER: Did the Copyright Owners say we will accede to this all-in rate where you carve out the public performance rate because you are giving us your -- you are conceding that a mechanical rate does apply to interactive streaming?

THE WITNESS: I mean I don't want to overly speak to their mind, but that seemed to be a determining factor.

JUDGE STRICKLER: Yeah. I don't want you to speak to their mind. I want you to speak to what you heard, what they said or what was told to you by someone from DiMA as to how, what they said in the negotiations.

THE WITNESS: Yeah. Then the answer is yes.

JUDGE STRICKLER: Thank you.

THE WITNESS: Thank you.

MR. SCIBILIA: I would like to lodge an objection to the answer that was given, the question and answer before Your Honor raised a question which

was what other, the other key factor as well was that there was an acknowledgment by the publishers that non-interactive streaming would not implicate a mechanical rate and is that consistent with your understanding of the music users generally. And he said yes, I believe that is hearsay, and I object to it.

JUDGE BARNETT: Do you want to respond, Mr. Marks? Don't forget you have to turn that mic on.

MR. SCIBILIA: I'm sorry.

JUDGE BARNETT: So do I.

MR. MARKS: The question was intended to be broader than that and I -- the question was about his understanding of what the key drivers were from the perspective of music users generally, all of the key drivers of the settlement, not that last comment in particular.

JUDGE BARNETT: The objection is overruled.

BY MR. MARKS:

Q. Mr. Parness, did you expect at the time of the Phonorecords I settlement that music services would pay under the percentage of revenue prong or under the minima or floor fees that were negotiated

as part of the settlement?

A. We expected to pay based upon the percentage of revenue prong.

Q. And why is that?

A. Again, we did extensive modeling and analysis that included all of the various financial inputs and metrics that are part of that calculation, public performance costs, label costs, users, and we believed both retroactively, as well as going forward, we expected to pay on the percentage of revenue prong.

Q. Where were you working when the Copyright Royalty Board commenced the Phonorecords II proceeding?

A. I was then working at Rhapsody, which had by that point been spun out as a separate entity from RealNetworks.

Q. Were you involved in the negotiations that led to the settlement of the Phonorecords II proceeding?

A. I was, yes.

Q. In what capacity?

A. Again, I worked with, internally with my colleagues at Rhapsody to inform our viewpoints on what would be appropriate for the various rates and

terms in Phonorecords II.

I was also involved directly with DiMA, including the work groups that worked specifically on Phonorecords II. We were jointly represented in those negotiations, and I was involved with the selection and retention of counsel as well.

Q. What were the issues that were the subject of the negotiations that led to the Phonorecords II settlement?

A. There were two kind of highlight points. The first was the approach to the existing rates and terms, particularly for Subpart B, whether, you know, there was a consensus ultimately to roll those terms over or not, which was our view and initially the Copyright Owners did want to -- did ask for higher rates, so that was the first thing.

JUDGE STRICKLER: If I may interrupt, when you say the Copyright Owners did ask for higher rates, did they generically say we want the rates to be higher or did they propose specific higher rates?

THE WITNESS: There was a general, you know, dialogue, you know, we opened up by kind of talking generally about the approach. And it was mentioned that they did want to see higher percentages of revenue specifically for -- I don't

recall them turning a formal offer on that, but I was aware of one conversation that I was in the room for in person when the Copyright Owners were saying that they were going to be seeking higher rates for Subpart B services.

JUDGE STRICKLER: And the higher rates they were seeking for the Subpart B services was in the form of a higher percentage?

THE WITNESS: We spoke a little bit about that they would certainly be asking for higher percentages of revenues. I can't say that we really got into the weeds on what would happen to some of the other things, but there was talk from them about specifically wanting higher percentages of revenue.

JUDGE STRICKLER: Did they mention specific percentages?

THE WITNESS: Not that I can recall.

JUDGE STRICKLER: You said you recall what they said. Do you recall who the individual or individuals were who you were discussing this with?

THE WITNESS: Yes.

JUDGE STRICKLER: Who was that?

THE WITNESS: There was one meeting in particular that I remember with NMPA.

JUDGE STRICKLER: Who was representing

NMPA, who actually -- what human being actually made that statement?

THE WITNESS: David Israelite.

JUDGE STRICKLER: Thank you.

THE WITNESS: Thank you.

BY MR. MARKS:

Q. Why did --

A. Just to answer -- sorry, I wasn't finished with the answer from before. There was the other thing that we talked about in the run-up to Phonorecords II was that there were a number of services that were starting to emerge at that time, locker services, cloud-based offerings for which the digital services and others thought that they weren't either covered by the current regs or that the current regs, meaning, you know, coming out of Phonorecords I, Subpart B, didn't really -- didn't suit the needs of those particular businesses very well.

So one of the other things we sought to talk about on that, those discussions was the creation of additional service offerings for new models that were emergent at the time, not just cloud and locker.

JUDGE STRICKLER: That is the genesis of

what became Subpart C licensing.

THE WITNESS: That ultimately became Subpart C.

JUDGE STRICKLER: Was there any negotiations, as you recall them, was there quid pro quo, in other words, where the interactive streaming services said we will give you the Subpart C licenses but we're not going to give you the higher rates on Subpart B?

THE WITNESS: Can you repeat that again?

JUDGE STRICKLER: Yeah. Was there a quid pro quo, where the interactive streaming services said: All right, there will be a license and a payment under Subpart C, but in response, in return for that, there is going to be no increase in the percentage rate on Subpart B?

THE WITNESS: No, I wouldn't characterize it at that. They were largely dealt with as separate, where they were largely considered separate issues. I mean, to be clear, the Subpart C services were services that the digital services and the record labels asked for the creation of those services.

So we wanted Subpart C to be created, but I think, by and large, the creation of those service

offerings was dealt with as a separate issue from whether or not there would be increases for the existing Subpart B categories.

JUDGE STRICKLER: Well, in the negotiations did anyone, Mr. Israelite or anyone else on behalf of the Copyright Owners, indicate that there was -- that they wanted to receive a benefit in exchange for not raising the Subpart B percentage rate?

THE WITNESS: Not that I can recall.

JUDGE STRICKLER: Thank you.

BY MR. MARKS:

Q. Mr. Parness, why did you agree to continue the Subpart B rates as part of the Phonorecords II settlement?

A. We took a fresh look at the Subpart B categories, all of them, at the beginning of those discussions and beginning of the proceeding. And we drew the same conclusion that we did upon the conclusion of Phonorecords I in that settlement, which is that, you know, while, you know, not perfectly ideal, we thought that those rates including the 10 and a half percent of revenue were viable and sustainable for digital music services.

And we thought that taken on its -- on

its total, we were willing to roll over those rates rather than reopen everything for a discussion.

Q. For Subpart C, that is the outgrowth of the Phonorecords II settlement, is there a mechanical-only floor fee that applies after the deduction of fees paid for music performance rights by the Services?

A. There is not.

Q. Why not?

A. We specifically -- that was an ask of the digital services and something we negotiated for in Subpart C. To be clear, as I mentioned before, we didn't like it in Subpart B, but we agreed to it because we didn't think, you know, we would be paying the minima.

But in Subpart C, we didn't want to open up Subpart B because taken on its whole we thought the rates were viable and sustainable, but it was something that we sought to approach differently in Subpart C.

Q. Mr. Parness, how many licenses with performing rights organizations have you negotiated over the course of your career?

A. Approximately two dozen.

MR. MARKS: I have no further questions.

JUDGE BARNETT: Are you going to have more than five minutes of cross-examination?

MR. SCIBILIA: Yes, Your Honor.

JUDGE BARNETT: Okay. I think we have all had just about enough today. No reflection on the company, just the hour.

Housekeeping, let's see, first of all, we will reconvene at 9:00 o'clock in the morning. And what we have done in these larger cases for our own sanity is put together a reference paper that has a picture of each witness with their name and who they were testifying for.

And we noticed that some of you had slides early on with photos and name identification of your witnesses. We would very much appreciate you sending us JPEGs of those photos with the identifying information, and that way we won't have to take the pictures.

Judge Feder has been doing it surrepetitiously, which is probably a violation of somebody's rights.

MR. MARKS: Can we submit that by e-mail or how would you prefer?

JUDGE BARNETT: E-mail would be fine and probably preferable. Send it to CRB.

MR. ZAKARIN: We will have to arrange to send our witnesses to photographers -- I am only kidding.

JUDGE FEDER: It doesn't have to be full face, it can be profile.

MR. ZAKARIN: And not against something that tells you how tall they are?

JUDGE BARNETT: No, not at all. Thank you.

MR. STEINTHAL: Can I raise one housekeeping issue?

JUDGE BARNETT: Yes, please.

MR. STEINTHAL: We had a witness who is no longer in the employ of Google and we're unable to compel his attendance. And as a consequence in an exchange of e-mails and the like the Copyright Owners objected to our having another Google employee knowledgeable about the facts and circumstances adopt the testimony and come in and be subject to cross-examination.

JUDGE STRICKLER: Is that the substance of your emergency motion?

MR. STEINTHAL: Yes. From a logistics perspective, since we didn't hear this morning that motion mentioned, obviously we would want to arrange

to have that witness here next week, if the motion is going to be granted and if the Copyright Owners decide they want to cross-examine, rather than waive cross.

So I just want to put that high on the -- I know there is a big mountain that you are dealing with, but because of the logistics issues associated with getting that witness who happens to be in California, I just wanted to put that near the top of the logistics issues.

JUDGE BARNETT: Thank you. I only became aware of that motion during the noon recess, so we will definitely elevate it.

MR. SCIBILIA: Yes, Your Honor. We actually received the motion late last night so we haven't had a chance to oppose it. We will probably submit something tonight in opposition to that.

We believe that the witness who -- Google has known the witness is no longer at the company since January. They have said nothing about it.

JUDGE BARNETT: You know what, you don't need to argue on your feet right now.

MR. SCIBILIA: Thank you.

JUDGE BARNETT: We will accept what you have to say. Anything else? Thank you all. It has

been a long, warm day. Please, I implore you, if it becomes too warm, take off your jackets. I don't want to have anybody passing out here in the hearing room. It would slow us down.

We're in recess until 9:00 o'clock in the morning.

(Whereupon, at 5:06 p.m., the hearing recessed, to reconvene at 9:00 a.m. on Thursday, March 9, 2017.)

C O N T E N T S

AFTERNOON SESSION: 137

CONFIDENTIAL SESSIONS:

29-40, 101-136, 187-249, 276-278, 284-287

E X H I B I T S

EXHIBIT NO:	MARKED/RECEIVED
COPYRIGHT OWNERS	
3220	213
3221	213
3222	213
3223	213
3224	214
PANDORA	
875	293
876	294

CERTIFICATE

I certify that the foregoing is a true and accurate transcript, to the best of my skill and ability, from my stenographic notes of this proceeding.

3/9/17 

Date Signature of the Court Reporter